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A treatise on the law of official bonds



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A TREATISE

ON THE LAW OF

OFFICIAL BONDS

AND

OTHER PENAL BONDS.

BY

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Author of "The Law of Sheriffs," etc.

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PREFACE.

The constant and increasing practice of securing, by the exaction of official bonds, the performance of public and *quasi*-public duties has developed a great amount of litigation and raised many legal questions involving very important interests, public and private. In view of this fact it is believed that a treatise, embodying the law on the subject of "Official Bonds," and bringing into our view the common law, the ancient cases and doctrines, and the modern rulings of the courts, English and American, state and national, would be useful to the profession.

In the following pages are treated as official bonds all those prescribed by public law, those which the government, state or federal, may, in pursuance of statutes, exact from private individuals, as well as those required of or furnished by public functionaries.

It appears equally desirable to place in the same category those bonds which have been indirectly authorized by statute, such as bonds for the benefit of corporations, prescribed by the by-laws under the sanction of their organic laws, the charters from which they derive their existence and their powers. The same general principles pervade the law controlling these several classes of obligations, but wherever one class of bonds is found to vary in its legal character-

istics from others, the differences, and their *rationale* have been carefully noted.

As in almost every instance of litigation growing out of penal bonds, the contest is made by the surety, the principal being confessedly derelict, the subject of suretyship has required very careful and thorough consideration and treatment.

WILLIAM L. MURFREE, SR.

ST. LOUIS, Mo.,

FEB. 25, 1885.

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§ 1. What is a bond. — A bond may be briefly defined to be a sealed obligation to pay money. It may be either single and absolute, or upon condition and contingency.¹ However complicated may be the condition or contingency, and however alien from pecuniary considerations may seem the inducements to its execution, or the circumstances surrounding the parties, a bond will always be found to resolve itself into an obligation to pay money sooner or later, either absolutely or upon some condition, or on the happening of some future event. At common law, and, indeed, under the statutes of most of the states, a bond must be under seal, and it is, therefore, entitled to the peculiar privileges and special consideration which the law accords to all instruments executed with that solemnity. Being, in a legal sense, of a higher nature than a simple contract debt, it extinguishes, or more properly supersedes, such a debt, if it is founded upon it, and executed by the simple contract debtor. Thus, where a legatee had taken from the executor his bond for the amount of the legacy, the bond was held to have extinguished the antecedent cause of action for the legacy, and deprived the legatee of his right to sue in the ecclesiastical court, which would otherwise have been the proper forum.² If, however, a bond be executed by a stranger to the original debt, it is regarded as a guarantee, does not operate to extinguish that contract, but becomes a cumulative security for its performance.³

§ 2. A bond is a personal obligation. — A bond is, in one sense, a personal obligation, as the liability of the obligor adheres to him wherever he may go, irrespective of the

¹ Coke Litt. 172 (a); *Cantey v. Duren*, Harper, 434; *Taylor v. Glaser*, 2 Serg. & R. 502; *Harman v. Harman*, 1 Baldw. C. C. 129; *Skinner v. McCarty*, 2 Porter, 19; *Demming v. Bullitt*, 1 Blackf. 241; *Dinton v. Adams*, 6 Vt. 40; *Wood v. Willes*, 110 Mass. 454; *Hargroves v. Cooke*, 15 Ga. 321; *State v. Thompson*, 49 Mo. 188; *Gilbert v. Anthony*, 1 Yerg. (Tenn.) 69; 24 Am. Dec. 439.

² *Goodwynn v. Goodwynn*, Yelv. 89; *Luke v. Alderne*, 2 Vern. 81.

³ *White v. Cuyler*, 6 Term, 176.

place at which the instrument was executed. It is not necessary, therefore, to the validity of a bond that the place of its execution should appear upon its face. If, however, it is dated at a particular place, and suit is brought upon it elsewhere, the true place of its execution must be stated in the declaration, and the place of trial be introduced under a *videlicet*.¹

§ 3. Incidents attached to a bond as a *chose in action* —

Assignability. — A bond is a *chose in action*, and as such, is affected by all the incidents which attach to securities of that character. If it be given to a *feme sole*, who marries and her husband dies before he has reduced it into possession, the property in the bond survives to her; and if, on the other hand, she dies before it is collected, her husband is entitled to the bond only as administrator of his wife. At common law it was not so far assignable that the assignee could sue upon it in his own name, nor, indeed, in the name of the obligee, unless authority to do so had been conferred in the assignment; and it has been said that its transfer in old times vested in the assignee only a power over the parchment or paper and the wax, to burn the one and melt the other.² This rule, however, was so far relaxed that suits in the name of the obligee for the use of his assignee became common before they were authorized by any statute. And it was held many years ago that in equity upon a consideration paid, a *chose in action* may be assigned,³ and if the obligor, after notice of the assignment, should make a payment to the obligee, or take a release from him, neither the payment nor the release was in any degree available as a defense to a suit brought upon the bond by the assignee, or for his use.⁴ Indeed, it has

¹ Roberts v. Harnage, 6 Mod. 228.

² 7 Bacon Abridgment, "Obligation (A)" p. 287.

³ Crouch v. Martin, 2 Vern. 595; Thomas v. Freeman, 2 Vern. 563.

⁴ Legh v. Legh, 1 Bos. & P. 447; Innel v. Newman, 4 Barn. & Ald. 419; Jones v. Herbert, 7 Taunt. 421.

been said that where the plaintiff is a merely nominal person and trustee for the party in interest, if he releases the action he will be committed for contempt.¹ It was doubted, however, in a later case, whether, although the plaintiff be so punished, his release did not, nevertheless, defeat the action,² but it seems that when the release is pleaded, the fraud in procuring and giving it may be successfully replied.³ The true rule is well stated in an American case, that where there is collusion between the nominal plaintiff and the defendant to defraud the assignee, "a court of law will always take notice and protect the interest of an assignee; but not so as to conclude or injure any party, but so as to save the rights of all."⁴

§ 4. Modern doctrine as to the assignability of a bond. — It is, perhaps, unnecessary to pursue this subject here. It is sufficient to say that at this day the assignee of a bond or other *chose in action*, who has paid for it a fair consideration has, at least, every legal and equitable right that was possessed by the original obligee. And if he is a *bona fide* holder for a valuable consideration, without notice of equitable defenses, and the instrument is technically negotiable, he stands in a better position than the original obligee himself. These considerations, however, more properly appertain to the subject of bills and notes than that now under consideration.

§ 5. Who may be the obligor and who the obligee of a bond. — These questions are very easily answered. All persons *sui juris*, under no disability, or duress, having sufficient understanding to make any other legal contract may become the obligors in a bond of any character, and so may all cor-

¹ Anon. Salk. 260.

² Bauerman v. Rademus, 7 Term, 670.

³ Crail v. D'aeth, 7 Term, 670 (*note*).

⁴ Wardell v. Eden, 2 Johns. Cas. 126; Andrews v. Becker, 1 Johns. Cas. 411, and cases cited in notes; Littlefield v. Storey, 3 Johns. Rep. 425.

porations upon which that right is conferred by their respective charters, or the general law of the state of their domicil, or is inherent in their nature. And all persons whatever, whether *sui juris* or not, are competent as obligees, for if themselves incompetent to contract, they are in no degree bound by the action of the other party, but may receive the benefit of it if it is to their advantage, and disavow it if it prove to be otherwise. The old law, it has been said, makes an exception of a *feme covert* who cannot be the obligee of a bond howsoever much it may be to her advantage, if her husband dissents. In that case the obligor may plead *non est factum*.¹ It may well be doubted whether this ever was the law, for the *dictum is obiter*, and certainly at this day a husband would not be permitted by a court to deprive his wife of any advantage that might accrue to her by the voluntary action of a third person. As between husband and wife at common law, all contracts are void, and so a bond in which husband and wife are respectively obligor and obligee is a nullity. A bond given by a woman to the person whom she afterwards marries is extinguished by the marriage; but, if before the marriage *he* executes a bond conditioned for the payment of money to her after his death, it may be enforced at law against his heirs.²

The English law makes another exception to the rule that any one may be the obligee of a bond. A corporation sole, such as a bishop, can not as a corporation, be the obligee of a bond; but it shall enure to such person in his individual capacity; a corporation aggregate, however, can take chattels of any character whatever, bonds, leases, etc., because such a corporation is always in being.

§ 6. Essentials of a bond — Seal and signature.—The seal seems to be the most indispensable characteristic of a

¹ Whelpdale's Case, 5 Coke, 119.

² Milbourn v. Ewart, 5 Term. 381; Cage v. Acton, 1 Ld. Rayd. 513.

bond. It is that which distinguishes it from an ordinary written contract and imparts to it the presumption of a valid and sufficient consideration.¹ To an action on a sealed instrument a plea of failure of consideration is inadmissible, although the defense may be made that the consideration was illegal, immoral, or against public policy.

Besides the sealing and delivery, all other incidents of the execution of a bond are immaterial. There is no set form prescribed by law, and if the writing expresses the undertaking by the one party to pay money to the other, with or without condition, and is sealed and delivered, it is a valid bond.² Nor is it necessary that the instrument should be dated, nor if dated, that it should be correctly dated.³

The seal, it is almost superfluous to say, is an impression upon wax, wafer, or other like substance, placed upon the instrument. This, in most of the states, has been superseded by a scrawl made with the pen adjacent to the signature of the obligor, and in some of the states, as in Michigan, Connecticut, and Tennessee, even this is dispensed with by statute, and in those states a written instrument, signed by the party, has the same effect as if it were also sealed. In other words, in those states a bond, *i.e.*, of a private person, is merely a written agreement signed and delivered.⁴ In Alabama the law is that if the instrument purports on its face to be sealed and is duly signed, it is sealed, although the actual seal or scrawl be omitted.⁵ In Illinois, however, the absence of the actual seal or scroll is in no degree amended by the words in the instrument "sealed with my seal," etc.⁶ One seal or scroll, will suffice for several

¹ *Harrell v. Watson*, 68 N. C. 454; *Parker v. Flora*, 66 N. C. 474; *Dorr v. Munsell*, 13 Johns. 430; *Page v. Trufant*, 2 Mass. 159; 3 Am. Dec. 41; *Harris v. Harris*, 23 Gratt 737.

² *Sawyer v. Mourgridge*, 11 Mod. 218.

³ *Pierce v. Richardson*, 37 N. H. 306; *Fourrier v. Cyr*, 64 Me. 32.

⁴ *McKinney v. Miller*, 19 Mich. 142; *Fish v. Brown*, 17 Conn. 343; Th. & St. Code (Tenn.), § 1804.

⁵ *Bancroft v. Stanton*, 7 Ala. 351.

⁶ *Chilton v. People*, 66 Ill. 501; *s. r. State v. Humbird*, 54 Md. 327.

obligors.¹ Nor does it seem to matter much where the party affixes his signature. Bonds have been held valid in which the obligor signed his name between the bond proper and the condition.² And even where an obligor put his signature in the place usually appropriated to witnesses, he was held liable, upon proof that he intended to execute the instrument as obligor and not as witness.³

§ 7. Same subject continued. — It has just been said that in some of the states the scroll which represents the seal has been abrogated by statute, in others, it may be added, the same result is attained by what may be considered judicial legislation. Thus, in Minnesota, where the question was upon the operation of a paper purporting to be a bond, but destitute of seals, the court said: “The instrument attached to the complaint is in the form of a bond, but it has no seal of any of the parties executing it. It is, therefore, not a bond. The statute requires a bond.⁴ But that there must be a seal to a bond is a mere technical requirement — a thing which does not effect the substance of the instrument. And we think that where parties assume to comply with the statute in such a case, it does not lie with them to object that they have omitted some mere matter of form. The substance of the instrument being what the statute requires, they ought not to be permitted to say that by reason of their neglect in matter of form it does not come under the technical designation given in the statute. The liability of defendants on it is the same as though it had a seal.”⁵

This is all very reasonable and sensible, but nevertheless a

¹ Hollis *v.* Pond, 7 Humph. 222; Martin *v.* Dortch, 1 Stew. (Ala.) 479.

² Reed *v.* Drake, 7 Wend. 345; Fourrier *v.* Cyr, 64 Me. 35; Richardson *v.* Boynton, 12 Allen, 138.

³ Richardson *v.* Boynton, 12 Allen, 138; Argenbright *v.* Campbell, 3 Hen. & M. (Va.) 144.

⁴ Gen. Stat. 1878, ch. 8, § 145.

⁵ County of Redwood *v.* Tower, 28 Minn., 45, 48.

trifle legislative. The court says of the unsealed instrument: "It is, therefore, not a bond. The statute requires a bond." And after citing the statute, proceeds to enforce as a bond, the paper which it has just said is not a bond.

The world is outgrowing the observances of the days when men used seals because they could not write their names, and the special obligations attaching to sealed instruments are gradually giving way under the influence of reason and common sense. In this case, however, the judiciary is a little ahead of the legislature.

It is the signature or seal of the party that fixes his liability on a bond, not the recital of his name in the body of the instrument, as one of the obligors. He is bound if he signs and seals, although his name does not appear in the instrument as one of its parties.¹

§ 8. Essentials of bonds continued — Execution. — A bond must either be actually executed by the obligor in person, or by some other person in his presence and by his direction, or else by an attorney duly constituted as such by a proper power under seal. And the execution of a bond is sufficiently established by proof, that, although the obligor's name and seal were placed upon the instrument by another person, he acknowledged it to be his act and deed.² And if the obligor himself signs the instrument, it is not essential that the witness shall see him do so. It is sufficient if, in the presence of the attesting witness, he acknowledges the instrument as his deed, and desires the witness to

¹ *Smith v. Crooker*, 5 Mass. 538; *Blakey v. Blakey*, 2 Dana, 463; *Fournier v. Cyr*, 64 Me. 35; *Martin v. Dortch*, 1 Stew. (Ala.) 479; *Campbell v. Campbell, Brayt*. (Vt.) 38; *Stone v. Wilson*, 4 McCord, 203; *Joiner v. Cooper*, 2; *Bailey* (S. C.), 199; *Fulton's Case*, 7 Cow, 484; *Bartley v. Yates*, 2 Hen. & M. 398; *Beale v. Wilson*, 4 Munf. (Va.) 380; *Vanhook v. Barnett*, 4 Dev. L. 272; *Keeton v. Spradling*, 13 Mo. 321; *Grimmett v. Henderson*, 66 Ala. 521; *McLain v. Sinnington*, 87 Ohio St. 484.

² *Hill v. Scales*, 7 Yerg. 410; *Rhode v. Louthvain*, 8 Blackf. 418; *Mager v. Hutchinson*, 7 Ill. 265; *Ingraham v. Edwards*, 64 Ill. 526; *Delius v. Cawthorne*, 2 Dev. L. (N. C.) 90.

attest it.¹ It is, of course, essential to the validity of a bond that the obligor should, when he executes it, be competent to make a contract. If he is so drunk that he does not know what he is doing, the bond is voidable; but if the obligor retains the consideration for which the bond was given, or otherwise avails himself of the fruits of the transaction, he will be held to have confirmed it.² And upon the same principle, if the obligor is illiterate, and deceived as to the contents of the instrument, if it be not truly read to him, or not read at all, and its purport be misrepresented, he will not be bound.³

§ 9. Validity of a bond — On what it depends. — The validity of a bond may depend upon its execution by other parties besides those whose liability is sought to be enforced. Thus, in California, a bond was executed by two persons as security for a third, whose name appeared in its recitals as principal, but who never signed nor sealed it. The court said: "It purports on its face to be the bond of the three. Some one must have written his signature first; but, it is to be presumed, upon the understanding that the others named as obligors would add theirs. Not having done so, it was incomplete and without binding obligation upon either."⁴ And so it is held that bail are not liable unless the bail-bond be executed by the principal.⁵ And where the bond was that of an administratrix, executed only by her sureties, there was a like ruling.⁶ It is worthy of note, however, that all these are cases of *joint* bonds, and that the principal obligor was, in each of them, the party who had not executed the instrument. The rule is different when

¹ *Pequawket v. Mathes*, 7 N. H. 230; 26 Am. Dec. 737.

² *Williams v. Inabnet*, 1 Bailey L. (S. C.) 343.

³ *Green v. North, etc.*, Township, 56 Penn. St. 110.

⁴ *Sacramento v. Dunlap*, 14 Cal. 421; citing, *Bean v. Parker*, 17 Mass. 591; *Wood v. Washburn*, 2 Pick. 24; *Sharp v. United States*, 4 Watts, 21; 28 Am. Dec. 676; *Fletcher v. Austin*, 11 Vt. 447; *Johnson v. Erskine*, 9 Tex. 1.

⁵ *Bean v. Parker*, 17 Mass. 591.

⁶ *Wood v. Washburn*, 2 Pick. 24.

the bond is joint and several, for in that case, unless there is evidence that the defendant executed the bond upon an express agreement that it should not be delivered as his deed, without the signatures of the other parties named in it, he is bound by the instrument.¹

And it is no defense to a surety in a replevin (or presumably any other) bond that the principal, whose name is recited as such in the bond, and who executed it, was, at the time of its execution, a *feme covert*. The court says: “While the general rule is that the extent of the liability of the surety is measured by that of the principal, it is not of universal application, and exceptions to it may arise when the matter of defense pleaded by the principal is wholly of a personal character, as *coverture* or *infancy*.²

§ 10. Same subject continued. — It has been held, however, in Michigan, that if a person who is named in an appeal bond as one of the sureties refuses to sign it, and others do sign it, the burden is upon the person who claims under the instrument of explaining the omission, and showing how it is that the sureties who did sign it are liable, although they have not the aid of their supposed co-surety in bearing the burden. Each of the recited sureties is entitled to expect that all the others will execute the instrument, and if, in addition, one of the sureties denies under oath that he executed the bond at all, and charges that his signature is a forgery, the further burden is placed upon the beneficiary of showing that those from whom he seeks to recover, signed the instrument with a full knowledge of all the facts.³

In Ohio a bond executed by the sureties of a county

¹ *Cutter v. Whittemore*, 10 Mass. 442; citing, *Johnson v. Baker*, 4 Barn. & Ald. 440. See, also, *Adams v. Bean*, 12 Mass. 140; *Trustees v. Scheick*, 10 (Brad.) Ill. App. 51.

² *Lobaugh v. Thompson*, 74 Mo. 600; *Long v. Cockrell*, 55 Mo. 93; *Weed, etc., Co. v. Maxwell*, 63 Mo. 486.

³ *Woodin v. Durfee*, 46 Mich. 424.

treasurer, who neither signed nor sealed it, although his name was recited in it as one of the obligors, was held to be good not only as a common-law bond, but as executed in sufficient compliance with the statutes of that state to be considered a statutory bond.¹ In such case the essential part of the officer's duty in the premises was to give security, not *give a bond*, which in no respect would increase his personal responsibility.

§ 11. Validity of bonds — Recitals. — It is not necessary to the validity of a bond, or the obligation of the parties thereto, that their names shall be recited in the body of the obligation, and if the name of one of the obligors does not appear in the recital, he is as fully bound as if it did, provided he has duly executed it.²

The signer of a joint and several bond cannot deny its binding obligation, even where it appears upon its face to be drawn for the signature of others, and they were not annexed unless he declared at the time that he would not be bound if such signatures were not obtained.³

§ 12. Validity of bonds Consideration. — At common law a party was not permitted to plead a want of consideration as a defense to an action on a sealed instrument — the presumption of the existence of a consideration being absolute and conclusive.⁴ In some of the states, among others California, that presumption is, by statute, reduced to the grade of a *prima facie* presumption, or, in other words

¹ *State v. Bewman*, 10 Ohio 445; citing, *United States v. Brown*, 5 Pet. (30 U. S.) 373; *United States v. Tingey*, 5 Pet. (30 U. S.) 115; *United States v. Bradley*, 10 Pet. (35 U. S.) 359; *United States v. Linn*, 15 Pet. (40 U. S.) 290; *Postmaster-General v. Early*, 12 Wheat. (25 U. S.) 136; *Alleghany County v. Van Campen*, 3 Wend. 48.

² *Partridge v. Jones*, 38 Ohio St. 375, 377; *McLain v. Siiunngton*, 37 Ohio St. 484; *Kursaley v. Shenberger*, 5 Watts, 193; *Ahrend v. Odiorne*, 125 Mass. 50; *Leath v. Bush*, 61 Penn. St. 395; *Sheed v. Labshultz*, 51 Ind. 38.

³ *Los Angelos v. Mellus*, 59 Cal. 444, 450; *Cutter v. Whittemore*, 10 Mass. 444.

⁴ *Vraaman v. Phelps*, 2 Johns. 177; *Door v. Munsell*, 13 Johns. 430.

declared liable to be rebutted by proper pleading supported by sufficient evidence.¹ Everywhere, however, it is competent to show that the consideration of a bond is illegal, and a bond founded upon such a consideration is not merely voidable, but void. Thus a bond given for the price of lottery tickets (lotteries being prohibited by law) is void;² and in like manner a bond given for money won at play;³ and so a bond given as a consideration for the sale of a public office;⁴ and a bond is fatally tainted which is given to induce a public officer to do something that he has no right by law to do;⁵ and a bond indemnifying an officer for *not* doing his duty by returning an execution is against public policy and void;⁶ and equally fatal to the validity of a bond is the fact that its object is to induce him to perform his duty and do something that the law requires at his hands;⁷ and, generally, whenever the consideration of a bond is illegal, whether it be *malum in se* or *malum prohibitum*, or in hindrance of the course of public justice, or otherwise against public policy, the bond is void and no action can be sustained upon it.

§ 13. Delivery of a bond—Subscription. — Not only must a bond be sealed, but it should be subscribed and *must* be delivered. To subscribe properly means to write under, and although some deviations from the proper practice have been permitted, the rule is that the signature should be on the right hand of the page, at the bottom of the instrument. As already shown, a signature may be legally placed between the bond proper, and the condition, and even at the left side of the page at the bottom, where witnesses usu-

¹ McCarty *v.* Beach, 10 Cal. 461.

² Morton *v.* Fletcher, 2 A. K. Marsh. 138; 12 Am. Dec. 366.

³ Davidson *v.* Givins, 2 Bibb. (Ky.), 200; 4 Am. Dec. 695.

⁴ Lewis *v.* Knox, 2 Bibb (Ky.), 453; Davis *v.* Hall, 1 Litt. (Ky.) 9.

⁵ Moore *v.* Allen, 3 J. J. Marsh. (Ky.), 621.

⁶ Greenwood *v.* Colcock, 2 Bay (S. C.), 67.

⁷ Mitchell *v.* Vance, 5 T. B. Mon. 529; 17 Am. Dec. 96.

ally sign, but in every case it is essential that the name must be written and intended as a *signature*, and not as a recital. Hence, it has been held that in a state, the law of which requires that bonds shall be *subscribed*, the name of a party appearing in his own handwriting in the recitals of a bond is not an execution thereof by him, and there can be no presumption that he intended that his name so recited should be his execution of the bond.

And where a bond, incomplete by reason of the absence of the signature of its principal, has been duly executed and delivered in that condition to the obligee, he is charged, of course, with notice of the defect, and is liable to all the consequences of such defect; but if the sureties, equally aware of the deficiency of the instrument in this respect, caused or permitted it to be delivered to the obligee, they are liable upon it in the absence of any other evidence exonerating them.¹

§ 14. Same subject continued. — The delivery of a bond to the obligee is as essential a part of its execution as its seal or signature, and to support an action upon it, such delivery must be averred and proved.² As to what constitutes the delivery of a bond, the principles are the same as those which govern the delivery of deeds, and it is not a little difficult to frame any general and exhaustive rules on the subject. The nearest approximation that can be made, appropriate to this work is, that "to constitute a delivery, the instrument must either pass into the power of the grantees, or so as to be beyond the control of the grantor, or the grantor shall unequivocally indicate his intention that it shall take effect" according to its terms.³ And it is a further rule that the delivery of a deed (or bond) is always a question of intention, and that

¹ Wildcat Branch *v.* Ball, 45 Ind. 213.

² McPherson *v.* Meek, 30 Mo. 345.

³ Martindale on Conveyancing, 175; Fisher *v.* Hall, 41 N. Y. 416; Duer *v.* James, 42 Md. 492; Huey *v.* Huey, 65 Mo. 689.

in all cases the intention must exist that the instrument shall be operative.¹ There is a still further rule that the delivery must be known and assented to by the grantee, or, in other words, that the instrument must be accepted.² A fourth rule is, that a delivery to a third person for the use of the grantee (or obligee) is sufficient, unless repudiated by the obligee.³

§ 15. Delivery of a bond — How, when, where, by whom, to whom. — The delivery of a bond being an essential and indispensable part of its execution, it must be duly and legally made in order to perfect the instrument. In Pennsylvania, it was held that a bond executed in part on Sunday, but delivered to the proper officer on Monday, was a valid bond, although by the law of that state contracts entered into on Sunday are void. The court said that it was the delivery of the instrument that constituted its execution, so far as concerned the obligee, and therefore that the contract was made on Monday.⁴

§ 16. Delivery of a bond — The place where the delivery of a bond must be made. — The place where the delivery of a bond is made is often a matter of importance to the parties interested in it, and controls, in some material respects, the validity and operation of the instrument. Thus, in a Nevada case, a bond for the payment of money was written in California and executed by one of two parties there, carried to Nevada, there executed by the

¹ *Stelle v. Miller*, 40 Iowa, 402; *Burkholder v. Casad*, 47 Ind. 418; *Stiles v. Probst*, 69 Ind. 382.

² *Commonwealth v. Jackson*, 10 Bush, 424; *Woodbury v. Fisher*, 20 Ind. 387; *Cooper v. Jackson*, 4 Wis. 537; *Comer v. Baldwin*, 16 Minn. 172; *Mitchell v. Ryan*, 3 Ohio St. 377.

³ *Fewell v. Kessler*, 30 Ind. 195; *Hatch v. Bates*, 54 Me. 136; *Hatch v. Hatch*, 9 Mass. 307; 6 Am. Dec. 67; *Turner v. Wheddan*, 22 Me. 121; *Guest v. Beesen*, 2 Houst. 246; *Morrison v. Kelly*, 22 Ill. 610.

⁴ *Commonwealth v. Kendig*, 2 Penn. St. 448; *Prather v. Harlan*, 6 Bush, 185.

other party, and transmitted to the obligee in California, who was a resident of that state. Under the Nevada statutes it became a vital question whether the instrument was, in the language of the Nevada statute of limitations, "obtained, executed, or made out of this territory." The court held that the bond was a Nevada instrument; that its partial execution in California, and the receipt of the consideration money there, did not impress upon it any of the characteristics of a California bond; that until it was executed in Nevada by the second obligor, and passed out of the control of both of them, it was not delivered, and consequently had not up to that time been "obtained, executed, or made." The delivery consummated the execution, and that was made when (if sent to the obligee by mail or express), it was placed in the office for transmission, or if sent by private hand, when delivered to the messenger who became the agent of the obligee, and delivery to him was delivery to the obligee.¹ The court in this case follows the rule that the delivery of a deed or bond is that which places it beyond the control of the grantor or obligor, and within that of the grantee or obligee.

§ 17. Same subject continued — Constructive delivery. — A bond is sufficiently delivered which never leaves the possession of the obligor, if the intent of delivery on his part is manifest. Thus where the obligor said, after signing and sealing the bond: "Here is your bond, what shall I do with it;" and added "I will keep it for you."² But if the obligee declines to accept the bond, there is no delivery. Thus where a debtor agreed, in consideration of a discharge of his debt, to give his bond to the state, to whom his creditor was indebted, and the bond was executed and offered to the agent of the state, who declined to

¹ *Alcalda v. Morales*, 3 Nev. 132.

² *Folly v. Vautuyl*, 9 N. J. L. 153.

receive it; the bond was held invalid for any purpose because there was no delivery to the obligee.¹

§ 18. Delivery of a bond—By whom. — The delivery of a bond must be made by its obligors, or by a person duly authorized to deliver it, or it will not be valid. Thus, a guardian who had with his sureties executed a bond that was approved by the judge of probate or equivalent officer, retained the bond and proceeded to act as guardian until his death two years afterwards, when it was found among his papers by his administrator. The delivery of the bond into court by the administrator was held to be no legal delivery, and the sureties upon it were not liable for the defaults of the guardian.²

§ 19. Delivery of a bond—To whom—As an escrow. — A bond, like any other deed, may, in a proper case, be delivered as an escrow. Where a surety, or a number of sureties, deliver an instrument of that character into the hands of the principal obligor upon the conditions that others shall sign it, the bond is an escrow, and the delivery does not become absolute until the condition is either fulfilled or withdrawn by the obligors. And parol testimony is admissible to prove the fact that the delivery of the bond was upon condition and that it was, therefore, an escrow.³ A bond, however, cannot be delivered as an escrow to its obligee, nor to one of several obligees, as to a member of a partnership, for a delivery to one is a delivery to all.⁴ As already stated, the fact that the delivery was conditional, may be proved by parol or other sufficient evidence; but the appearance in the

¹ *State v. Oden*, 2 Harr. & J. 108, note.

² *Fay v. Richardson*, 7 Pick. 91. See, also, *Fitts v. Green*, 3 Dev. 291; *Whisell v. Mebane*, 64 N. C. 345.

³ *Pawling v. United States*, 4 Cranch (8 U. S.), 219 (per Ch. J. Marshal); *Fertig v. Bucher*, 3 Penn. St. 308; *Crawford v. Foster*, 6 Ga. 202.

⁴ *Moss v. Riddle*, 5 Cranch (9 U. S.), 351; (per Ch. J. Marshal); *Blume v. Burrows*, 2 Ired. (N. C.) 388.

body of the bond, as one of its obligors, of the name of a person, who did not sign it, is not of itself sufficient evidence to show that those who did sign it, executed it upon the conditions that *that* person, also, should be their co-security.¹ In all cases, the question whether an instrument was delivered as the deed of its apparent obligor, or as an escrow, is a question for a jury, and it is necessary for its proper solution that the paper should be put in evidence and placed before the jury, and especially is that the case, when one of the names recited in it as obligors had been erased, and the question is raised whether that fact necessarily destroyed the identity of the instrument and abrogated its validity.²

§ 20. Delivery of bond — Blanks. — It is not unusual that bonds are signed in blank by their obligors and are afterwards filled up by other persons. This can be lawfully done, provided the completion of the instrument is performed by the express authority of those who are to be bound by it. Thus, where a principal and his sureties, signed a blank form of an official bond for writ of error and supersedeas, and the principal, in the presence of the sureties directed the clerk to fill up the form, the court held that this direction was an express authority by the sureties, as well as the principal, to complete the bond, and that they, as well as he, were bound by it.³

§ 21. Same subject continued. — If a bond is written above the blank signature of the obligor in his absence, and without his express authority, it is void; but *it seems* may be validated by a subsequent acknowledgment and redelivery by him. Thus a party signed and sealed a paper in blank, which was subsequently filled up as a bond for money, and

¹ *Towns v. Kellett*, 11 Ga. 286; citing, *Blume v. Burrows*, 2 Ired (N. C.) L. 338; *Elliott v. Mayfield*, 4 Ala. 417.

² *State v. Bodley*, 7 Blackf. 555.

³ *Gibbs v. Frost*, 4 Ala. 720. See, also, *Bell v. Keefe*, 13 La. Ann. 524.

afterwards the obligor asked to see it, received it, saying : " There is my note — there it is," took a memorandum from it and handed it back to its custodian. These circumstances the court held, constituted neither an acknowledgment nor a redelivery, such as would bind him, because, if he considered himself legally liable, there could be no motive for a redelivery or reacknowledgment ; if he did not, there was still less inducement, for he was only a surety and his principal was insolvent. A redelivery, the court remarks, implies that the party should do something equal to making a new deed.¹

§ 22. Delivery of bonds — Blanks — Blank obligee. — Whether a blank left for the name of an obligee of a bond can be filled by another person, after the execution of the instrument by the obligor, is a question upon which the authorities are contradictory. In a Virginia case, in 1873, the subject is very exhaustively treated. The facts presented the question fairly without complications or side issues. Mantz, as principal, and Preston, as surety, signed and sealed a bond to pay to (blank) six hundred dollars. The bond was left in the hands of Mantz, with parol authority from Preston to fill the blank with the name of the person who should lend the money upon it. Hull lent the money, his name was inserted as payee by Mantz, and the bond was delivered to him. As the debt was not paid at maturity, Hull brought suit, and Preston pleaded *non est factum*. The Court of Appeals said: "A bond is a deed whereby the obligor promises to pay a certain sum of money to another at a day appointed. An obligor and obligee are essential to the existence and constitution of such an instrument. It is not indispensable that the party to whom the promise is made should be mentioned *eo nomine*, that his

¹ *McNutt v. McMahan*, 1 Head, 98; citing, *Turbeville v. Ryan*, 1 Humph. 113; 34 Am. Dec. 622; *Smith v. Dickison*, 6 Humph. 261; 34 Am. Dec. 306; *Mosby v. Arkansas*, 4 Sneed, 324.

name of baptism and surname shall be given, but he must be in some unmistakable manner designated in the instrument. A writing, though executed with all the solemnities of a deed, without such obligee, is a mere nullity. It imposes no obligation upon the party issuing it. It confers no rights on him who receives or holds it. It is not simply an imperfect deed; it is no deed at all. It only becomes a deed when the name of the obligee is inserted and delivery made by the obligor or some one legally authorized by him. If the blank is filled by an agent, then the agent as certainly makes the deed as though the entire obligation had been written, signed, sealed and delivered by him. His act binds a principal not before bound. It creates a contract having no previous existence. It is true the act in question is merely the insertion of a name. Still, its effect is to impart vitality to a piece of waste paper. It calls new rights and obligations into existence. It is followed by all the consequences resulting from the execution of the most solemn instruments."

The power to do all this, the court concludes, cannot be conferred by parol. "The stream can never be higher than its source. If the act of the agent is the execution and delivery of a deed, his authority must be by deed. It does not matter how much of the instrument may have been written by the principal, it is a mere nullity when it leaves his hands, and only becomes operative by act of the agent; upon every principle of sound legal reasoning, the result must inevitably be the same. Whenever the agent undertakes to bind his principal by an act, his authority must be co-equal with the act."

The court very pertinently asks: "If the name of the obligee may be inserted why may not the sum also; and if these may be supplied, why not the mere formal parts of the deed. If we once depart from the rule, how is the line to be drawn consistently with the preservation of any rule

at all. If we say that the name or sum may be inserted by the agent, will it not lead us inevitably to the doctrine that the entire deed may be executed by the agent also?"¹

§ 23. Same subject continued—Missouri ruling. — In direct contradiction to this ruling is the decision of the supreme court of Missouri in a case in which the same question was distinctly presented. That was a case of a sale of land. Plaintiff agreed with the defendant that he would execute a deed, with a blank for the name of the grantee, purporting to convey certain lots, and defendant undertook to find a solvent and responsible purchaser for them, who would pay off certain incumbrances on the lots, for which plaintiff was personally bound. Defendant, however, paid in part for the lots, the remainder of the purchase-money being represented by the discharge of the incumbrances and plaintiff's relief from his liability. Defendant did not comply with his engagement to furnish a responsible grantee for the deed, but inserted therein the name of an irresponsible person, who failed to pay off the incumbrances, and the lots were sold for so small a price that plaintiff was compelled to pay over eight hundred dollars by reason of his personal liability for the debts charged on the lots, and for this he brought suit.

The court said that the central question presented by the record was "whether a deed, regularly executed in other respects, with a blank left therein for the name of the grantee, and placed in that condition in the hands of a third person with verbal authority (but no authority under seal) from the person who executed it, to fill up the blank in his absence and deliver the deed to the person whose name should be inserted as grantee, and when said deed was so filled up and delivered, whether the same is void." The

¹ Preston *v.* Hall, 23 Gratt. 600; s. p. Upton *v.* Archer, 41 Cal. 85; Barden *v.* Southerland, 70 N. C. 528.

court held that the deed was valid, following and quoting the language of Mr. Justice Nelson in *Drury v. Foster*, 2 Wall. (69 U. S.) 24, saying: "Although it was at one time doubted whether a parol authority was adequate to authorize an alteration or addition to a sealed instrument, the better opinion at this day is that the power is sufficient."¹

§ 24. Same subject continued — Wisconsin ruling. — In a Wisconsin case a note and mortgage, each with a blank for the name of the payee and mortgagee, were delivered to an agent with parol authority to borrow the money from whomsoever he could, and, it is presumed, to fill the blanks and deliver the papers to the mortgagee. This the court held he was sufficiently empowered to do by parol authority, saying: "The great weight of authority undoubtedly is that effect will be given to the plain intention of the parties, notwithstanding the instrument may be under seal, and notwithstanding the technical rules of the early common law with respect to the execution and delivery of such instruments. If it be manifest that it was the intention of the party by whom the instrument was executed, at the time of its execution, that the name of the payee or mortgagee should be afterwards supplied and written in by the person to whom the instrument was delivered, then the rule of law is that the name may be so supplied and written in, and complete effect given to the instrument according to such intention."²

§ 25. Rule as to filling blanks — Massachusetts and Maryland. — In a Massachusetts case the court limits the power of an agent acting under a parol authority to making immaterial alterations of a sealed instrument, and says that

¹ *Field v. Stagg*, 52 Mo. 534; citing, *Drury v. Foster*, 2 Wall (69 U. S.), 24; *Burnside v. Wayman*, 49 Mo. 356.

² *Van Etta v. Evenson*, 28 Wis. 33, 38; *Vliet v. Camp*, 11 Wis. 198.

such alterations if not fraudulent will not invalidate it, although made by the party claiming under it.¹ The court adds, however: "The case is not within those in which it is held that blanks in a deed constituting a material part of the instrument itself cannot, in the absence of the maker, be filled by parol authority, because authority to make a deed must be given by deed."²

And in Maryland the court, in like case, says: "The name of the obligee is a *material* part of the deed, and delivery in blank is an insufficient delivery, unless recognized after the blank is filled. This is the general principle. There are some exceptions to it, but none of them applicable to a case like the one before us."³

It is believed that the true doctrine in this matter is that held by the Virginia Court of Appeals,⁴ that to constitute a valid obligation there must be an obligee as well as obligor; that a bond payable to "blank" is a nullity, and that no agent, acting under a parol authority, can convert such a nullity into a sealed instrument by filling in the name of the party of the second part, which is undoubtedly a material part of the instrument.

§ 26. Rules as to filling blanks—Tennessee. — The official bond of a constable is valid, although there are in it blanks intended to be filled with a recital of the name of the constable and a statement that he had been elected. The court says: "The record shows that the bond of the constable was acknowledged by the parties in open court, and his oath of office is indorsed on the same, and he has been

¹ *Vose v. Dolan*, 108 Mass. 158; citing, *Brown v. Pinkham*, 18 Pick. 172; *Commonwealth v. Emigrant, etc., Bank*, 98 Mass. 12; *Chessman v. Whittemore*, 23 Pick. 231; *Adams v. Frye*, 3 Metc. 103.

² *Vose v. Dolan*, *supra*; citing, on this last point, *Burns v. Leyude*, 6 Allen, 305; *Basford v. Pearson*, 9 Allen, 387.

³ *Edelin v. Sanders*, 8 Md. 118, 131.

⁴ *Preston v. Hull*, 23 Gratt. 600.

inducted into office on the faith of it. Having received the money by virtue of this bond, it is now too late to object to a mere verbal defect in it. The matter of the blanks there filled up was not probably material any way, as we think a recovery could well be had on the bond (which was otherwise complete) by proper averments, even if the blanks had never been filled.¹

§ 27. Operation of bond not controlled by external declarations. — The operation of a bond in accordance to tenor and effect can not be controlled by the person executing it by declarations or memoranda made by him outside the terms of the instrument itself. Thus, where the sureties of a sheriff on his official bond annexed to each of their signatures the figures “\$1,333.33 $\frac{1}{3}$,” intending thereby to limit the liability of each to that sum, and declared that intention in an affidavit delivered with the ‘bond itself’, the court held that the proceeding was futile and wholly unavailable to accomplish the desired purpose, and that the express liability contained in the bond itself could not be thus restricted.²

Nor can the obligee of a bond be affected by any understanding entered into between the principal obligor and his surety as to the procurement or joinder of other persons as co-sureties unless he had notice of such agreement.³

§ 28. When a bond is due and payable. — A bond is due and payable on the day named in it, if any day or payment be named; if there is none, it is due on the day of its date, if it be dated, or if it be not dated (it may be presumed) upon the day of its delivery, for it becomes operative from its delivery, which is the consummation of its execution. The question has been made whether interest

¹ *Rader v. Davis*, 5 Lea (69 Tenn.), 536.

² *Cordray v. State*, 55 Tex. 140.

³ *In re Mayo*, 4 Hughes C. C. 377, 385.

be recoverable upon a bond, dated, but silent as to its time of payment, and if so whether it should be computed from the day of its date or of the demand, if any, of payment. It was held in England that interest was recoverable "from the time of payment, namely, from the date, though not expressly reserved.¹ And this ruling has been followed in New York, the court saying that interest is generally payable from the time the principal ought to be paid.²

¹ *Farquhar v. Morris*, 7 Term, 124.

² *Purdy v. Philips*, 11 N. Y. 406; citing, *Wenman v. Mohawk Ins. Co.*, 13 Wend. 267; 28 Am. Dec. 484 Rens, etc., *Co. v. Reed*, 5 Cowen, 587.

CHAPTER II.

OFFICIAL BONDS IN GENERAL—WHAT ARE OFFICIAL BONDS.

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88. Limitation of official bonds as to time of operation.
89. When failure to renew bonds of officers of private corporations will not implicate directors.

§ 35. Official bonds generally — First class of such bonds. — Official bonds are such as are executed by certain classes of officers under the governments of the United States, of the several states, and of cities or other municipal corporations. They are required by statutes, which usually prescribe their conditions, penalties, and the number and qualifications of the sureties necessary for their acceptance. They are intended, of course, to secure the faithful discharge of the duties of the officers by whom they are executed, and, as a rule, are required only of those officers who, in the discharge of their duties, receive and pay out public money, or who, in the exercise of their functions, are liable to incur pecuniary liabilities to private citizens. Consequently neither political, judicial, military, nor naval

officers give any official bonds, except such of the latter two classes as are charged with the receipt and disbursement of public money, such as paymasters, pursers, and similar persons. As a rule, bonds are exacted from all civil ministerial officers, as their functions involve either the handling of public money or the pecuniary interests of individuals or both.

§ 36. Second class of official bonds. — There are still other bonds properly called official, to wit: those which are prescribed by statute and required to be executed by administrators, guardians, executors, and others, who as trustees hold estates, property, or money by authority of the law and are directly responsible to the courts for the due performance of their duties as trustees. The bonds of such functionaries differ in no material degree as to their legal incidents from those of public officers, except in those points in which differences and distinctions are especially created by statute. And in like manner bonds which, by law are required to be executed under certain circumstances in the course of judicial proceedings, such as indemnity, delivery, replevin, and appeal bonds, all fall within the general description of official bonds; in short, all bonds are official bonds which are prescribed by statute, or of which either the obligor or the obligee is a public officer and the subject-matter of the condition is either the discharge of public duties or proceedings of a judicial character in a court of law or equity.

§ 37. Third class of official bonds. — Of the same nature and controlled by the same general rules of law, are the bonds executed by the ministerial officers of business corporations, such as banks, railroad corporations, and similar organizations, and the bonds of this class of officers will be considered under the same heads as those of the strictly official type. The bonds of the latter class are pre-

scribed by public statutes, or by orders founded upon them ; those of the former by the charters of the corporations, or by-laws and similar regulations made under, or by virtue of those charters, or else under the inherent powers of such corporations, to frame the regulations necessary for carrying into effect the object of their being.

§ 38. Essentials of an official bond. — If a statute in prescribing the conditions and terms of an official bond declares all bonds not taken pursuant to it to be void, they are void of course ; but unless the statute so expressly provides, only the conditions of bonds which are contrary to the statute, are void ; and equally void are any onerous terms which may be imposed by the bond in excess of those authorized by the statute. The remaining conditions, however, are valid, and the obligor cannot be permitted to escape his obligation because his bond containing the general statement of his duty under it, does not include the more specific numeration prescribed by the statute.¹ If there is a substantial conformity in the bond to the terms of the statute, and no obligation, which is not imposed by the statute, be added, the bond is good as a statutory bond, and the summary remedies afforded by the statute should be allowed to enforce it.² And if the departure from the prescribed *formulæ* of the statute be that the penalty in the bond is greater than that authorized by the statute, the bond is nevertheless valid as to the statutory amount, to that extent regular and official, and void only as to the surplus.³ In North Carolina, however, it has been held that if a sheriff's bond be given in a penalty greater than that prescribed by the statute, such

¹ Justices, etc., *v. Wynn, Dudley* (Ga.), 22.

² *Bowing v. Williams*, 17 Ala. 510, 517.

³ *McCaraher v. Commonwealth*, 5 Watts & S. 21, 27. See also *United States v. Howell*, 4 Wash. C. C. 620; *Commonwealth v. Laub*, 1 Watts & S. 263; *Clapp v. Guild*, 8 Mass. 153; *Polk v. Plummer*, 2 Humph. 500; 87 Am. Dec. 566; *Goodrum v. Carroll*, 2 Humph 490; 87 Am. Dec. 564.

bond is not a statutory bond and therefore is not subject to successive suits as provided by the statute, but is extinguished by the first recovery.¹

§ 39. Official bond with illegal condition extorted from an officer.—It is of the essence of an official bond, that it shall conform to the law or other authority by which the execution of the bond is exacted. Hence, if an officer be required by the person who takes the bond, to execute an instrument varying from the requirements of the statute, and prescribing terms in excess of those embodied in the statute, and the execution of such an instrument is exacted as a condition precedent to his remaining in office and receiving its emoluments, such an instrument is *extorted* from the officer and is null and void.²

§ 40. A distinction and a difference.—A distinction worthy of note is made by the court in a Michigan case, between the character of a bond required by a statute, when the duties for the due performance of which the bond is required, are created and imposed by the statute itself, and when the bond is required for the discharge of antecedent duties or such as are imposed by authority other than that of the statute which directs the bond to be given. In the former case no recovery can be had until a bond in conformity with the statute is produced; in the latter case, less strictness is required and the officer and his sureties may be bound upon a bond materially deviating from the standard prescribed by the statute.³

§ 41. Statutes prescribing bonds—When and where directory.—While it is generally true that official bonds must conform to the statute by which they are authorized;

¹ *Branch v. Elliott*, 3 Dev. 86.

² *United States v. Humason*, 6 Sawy. 199; *United States v. Tingey*, 5 Pet. (30 U. S.) 115; *United States v. Bradley*, 10 Pet. (35 U. S.) 343.

³ *Bay County v. Brock*, 44 Mich. 45.

and if they do not, they are either invalid altogether, or valid only as common-law bonds, still in some of the states, as in Mississippi, the legislature in order to render such bonds effective has enacted that the statutes prescribing the form of official bonds shall be held to be directory only, and that an official bond shall not be vitiated by a failure to observe the prescribed form.¹ Indeed all bonds, in whatever form they may be taken are valid, unless they are conditioned for the performance of acts which are in violation of the laws or policy of the state.

§. 42. Execution of official bond — Blanks. — It is not necessary to the validity of a bond, whether official or otherwise, that the names of all, or indeed any of its obligors should appear in the text of the instrument. The persons who duly execute and deliver it are bound by it irrespective of its recitals.² “It is enough,” says the court, in a recent Ohio case, “in any written contract that the intent of the party fully appear, through it be not fully and particularly expressed.” And in an older case in Pennsylvania, the court says:³ “—the only object of the court is that when the meaning and intention of the parties are perfectly plain, no grammatical inaccuracy or want of the most appropriate words, shall render the instrument unavailing,”⁴

When an official bond has been signed by the officer and his sureties, and delivered to the proper officer, such delivery is an authority to fill up the blanks with the names of the obligors. If necessary, the blanks might be filled up on the trial of the case.⁵

¹ *Boykin v. State*, 50 Miss. 375.

² *Partridge v. Jones*, 38 Ohio St. 875.

³ *Kenseley v. Shenberger*, 5 Watts, 108.

* See also *McLain v. Sinnington*, 37 Ohio St. 484; *Ahrend v. Odiorne*, 125 Mass. 50; *Leath v. Bush*, 61 Penn. St. 395; *Sheid v. Leibschultz*, 51 Ind. 38.

⁵ *Hullz v. Commonwealth*, 8 Grant's Cases, 61; *Violet v. Pallon*, 5 Cranch (9 U. S.) 142; *Bank etc., Penwick*, 5 Mass. 25; *Bank of Commonwealth v. Curry*, 2 Dana, 142; *Rader v. Davis*, 5 Lea, (69 Tenn.,) 536.

§ 43. **Execution of official bond — Signing conditionally.** It very frequently happens that the sureties on an official bond seek to avail themselves, as a means of escape, of the fact that other persons were to sign the bond, and that they themselves had only signed it upon condition that such other persons would do likewise. The rule, however, is well settled that if the bond is regular upon its face, contains no recital or omission calculated to put the obligee upon inquiry, and he receives no notice of the alleged condition, the defense is unavailable after the bond has been accepted and acted on. But if the bond is so written that it appears that several were expected to sign it, the obligee takes it with notice that the obligors who do sign it can set up in defense the want of execution by the others, if they agreed to become bound only on condition that the other co-sureties joined in the execution.¹

To effect the release of a surety upon the ground that he signed the bond conditionally, it is essential either that the bond should be so far imperfect as to put the obligee upon inquiry as to the alleged condition, *e.g.*, that still another person was to sign it, or that proof be made that the obligee had actual notice that the execution of the instrument was upon condition, and what that condition was. Hence a surety cannot be heard to say that he signed on condition that a fourth man would sign with him, unless he can prove that the obligee had notice of the condition.² But if he can and does show that he signed the bond, and delivered it to the principal obligor on condition that it should not become obligatory until it was signed by still another surety, and that it was delivered without the signature of that person to the obligee, who had notice of the condition,

¹ *Dair v. United States*, 16 Wall. (83 U.S.) 1, 6; *s. c.*, 4 Myers Fed. Dec., § 511; *Pawling v. United States*, 4 Cranch (8 U.S.), 219; *State v. Peck*, 58 Me. 284; *State v. Pepper*, 31 Ind. 76; *Millett v. Parker*, 2 Metc. (Ky.) 608.

² *In Re Mayer*, 4 Hughes C. C. 377.

the writing was held to be a mere escrow as to such surety, and he was not bound by it.¹

§ 44. Same subject continued. — There is another principle of law involved in these cases of conditional execution of official bonds, and which often controls the solution of the questions arising from them. If a surety executes a bond and delivers it to the principal obligor upon conditions agreed upon between them, and with instructions to fill blanks or procure other sureties, he makes the principal obligor his agent, and is bound by his acts done within the scope of his apparent authority. Unless the obligee has notice of the conditions and instructions, he cannot be bound by them. The surety confides in the principal, the obligee does not. Thus a surety signed a blank bond with his principal to whom he gave the instrument with instructions to fill the blank with a penalty of \$4,000, and procure two additional *good* sureties before offering it for acceptance. The principal inserted a penalty of \$15,000, procured the signatures of two additional but *insolvent* sureties, and having thus completed the instrument, offered it to the government, by whom it was accepted. The court held that as the official person who accepted the bond had no notice of the conditions or instructions, acted in good faith, and accepted the bond in the belief that it had been properly executed, he and the government he represented were innocent parties, and so was the surety an innocent party; that the question being, which of two innocent parties must

¹ United States *v.* Hammond, 4 Biss. C. C. 283, 285; citing, Pepper *v.* State, 22 Ind. 399; Pawling *v.* United States, 4 Cranch (8 U. S.), 219; United States *v.* Leffler, 11 Pet. (36 U. S.) 86; Johnson *v.* Baker, 4 Barn. & Ald. 440; Leaf *v.* Gibbs, 4 Carr. & P. 466. See, also, on this subject generally, the following cases cited in a note by the reporter: Foy *v.* Blackstone, 31 Ill. 538; Furniss *v.* Williams, 11 Ill. 229; Neely *v.* Lewis, 5 Gilman (10 Ill.), 31; Price *v.* Pittsburgh, etc., R. R. Co., 34 Ill. 13; White *v.* Bailey, 14 Conn. 275; Coe *v.* Turner, 5 Conn. 92; Carr *v.* Hoxie, 5 Mason, 60; Jackson *v.* Rowland, 6 Wend. 666.

suffer, the loss must fall upon the surety who was in law and equity estopped by his acts from claiming as against the government the benefit of his private instructions to his own agent.¹

§ 45. Execution of an official bond—When it takes effect. — The time when an official bond goes into operation, and the liability of the surety begins, is often a very critical question. The supreme court of the United States held that the obligation of such a bond delivered to the obligee for acceptance and afterwards accepted by him, begins at the time of the delivery. The court says: “A bond may not be a complete contract until it has been accepted by the obligee; but if it has been delivered to him to be accepted if he should choose to do so, that is not a conditional delivery which will postpone the obligor’s undertaking to the time of its acceptance, but an admission that the bond is then binding upon him, and will be so from that time if it shall be accepted.” Hence, where a surety died after the alleged delivery of the bond and before its acceptance by the comptroller, his estate was held liable upon it.²

§ 46. Delivery of an official bond—Approval. — The rule governing delivery of deeds and bonds as between natural persons, is that if such an instrument is duly executed

¹ *Butler v. United States*, 21 Wall. (88 U. S.) 272, 275; citing and following *Dair v. United States*, 16 Wall. (83 U. S.) 1, 6.

² *Broome v. United States*, 15 How. (56 U. S.) 143, 149; *s. c.*, *Myers' Fed. Dec.*, § 552. In this case, it may be remarked, Mr. Justice Campbell dissented from the judgment of the court upon the very reasonable grounds that the certificate of the comptroller of the treasury of his approval of the bond is the best evidence of the time of its delivery as a valid and operative obligation. And upon the further ground that, “the delivery of a bond is only complete when it has been accepted by the obligee or a third person ‘for and in his behalf and to his use.’ The terms I have quoted from the Touchstone, imply a cession of the title to the paper in the act of delivery.” And Mr. Justice Campbell’s view of the law of the case is supported by many authorities as will appear elsewhere. See, *post*, § 72.

and delivered to a third person for the grantee or obligee, it is valid as against the obligor until the obligee refuses it. It is then void *ab initio*.¹ The rule is otherwise, however, when the bond is made payable to the state, not to subserve any interest of the state, but as the trustee for others. In such a case the bond does not become operative at all until it has been duly accepted by the state acting through its appropriate and duly accredited agents.²

And it seems that in North Carolina a sheriff's bond, payable to the State, executed in due form, and delivered to an official body that was not empowered by law to receive or approve it, although it was void *ab initio*, because of such illegal delivery, nevertheless became good *ab initio* by the passage of an act of the legislature, after the execution and delivery of the bond, and after the institution of a suit upon it, after the rendition of a judgment in that suit, and after an appeal taken. This act purported to validate all bonds previously taken by any court of pleas and quarter sessions upon the admission of any person into the office of sheriff or constable, and is regarded by the court as an absolute acceptance of all bonds of that character. It is believed, however, to be an act of retrospective legislation of the most objectionable character, and the ruling is of very questionable authority.³

§ 47. Execution of bond—The law which controls—Seal or no seal. —As the validity of a contract depends upon its conformity to the laws of the country in which it is executed, unless it is to be performed elsewhere, so its form as by bond or otherwise, and its authentication as by seal or other observance is governed by the same rule. If an instrument is executed in one country with express

¹ *Butler v. Baker*, 3 Coke, 26; *Wankford v. Wankford*, 1 Salk. 301.

² *State v. Shirley*, 1 Ired. L. 597, 606; *State v. Wall*, 2 Ired. L. 267; *State v. Pool*, 5 Ired. L. 105, 117.

³ *State v. Pool*, 5 Ired. 105, 113.

reference to the laws and judicial procedure of another country, it must conform to such laws and procedure. Thus, bonds executed under a power of attorney given in France, which was not under seal, were held invalid in a state in which sealed instruments were required for the purpose in view.¹

§ 48. Approval of official bond. — In common with all other bonds, it is essential that official bonds should be duly delivered and accepted. In case of bonds of that character, the acceptance is usually in the form of an approval by an official person of whom the discharge of that duty is required by law, or by a board or a court, and the mode or form of such approval is prescribed by the statute law of the state. For example, an administrator's bond must be accepted and approved by the probate court or the county court, or whatever other tribunal exercises ordinary jurisdiction. The acceptance of such a bond is a condition precedent to the issuance of letters of administration. And in like manner the approval of the bonds of officers generally by the appropriate tribunal is necessary, not to the validity of the bonds, but to the right of the officers to exercise the powers, and discharge the duties of their offices. In this, however, as in other cases, acceptance of the bond may be presumed from the action, or, in proper cases, the inaction, of the officer or court; thus the acceptance of a bond duly offered by an administrator will be presumed from the issuance of his letters of administration.

In this connection it has been decided, very superfluously, that an official bond cannot be restricted from operating according to its terms by any parol evidence of conversation between the principal and his sureties at the time of execution, not known to the officer whose business it was to

¹ *Harman v. Harman*, 1 Baldw. (U. S. C. C.) 129, 131; *s. c.*, 4 Myers Fed. Dec., §§ 17, 18. See, also, *Taylor v. Glaser*, 2 Serg. & R. 504.

approve the instrument.¹ Nor can the sureties set up as a defense to an action upon their bond that the approval of the bond by the proper officer was defective. The object of requiring approval at all is to insure greater security to the public, and it does not lie in the mouths of the obligors to object that it was approved without due examination as to its sufficiency.² And in Kansas it has been held that so far as the obligors are concerned the neglect of the proper officers to approve the bond was of no avail, that the deposit of the bond for record was delivery, and that the obligors could not escape responsibility because the approving officer neglected his duty.³

§ 49. Same subject continued. — And in Maryland the omission of the orphan's court to attest the validity of the sheriff's bond was held not to exonerate him or his sureties, "when the instrument they have signed is viewed as a statutory bond. Was the prescribed attestation designed for their benefit? Did it form any inducement to their entering into the contract? Assuredly not. The requisition was made solely for the benefit of others. Not to limit or impair the liability of the sheriff and his securities, but to multiply the facilities by which their liability would be rendered certain. There is nothing in the nature of the contract, nor in reason or justice, which should give to the omission of this ceremony the effect of annihilating this bond."⁴

§ 50. Approval of official bonds a public duty. — The duty of judging, approving, or rejecting official bonds which may be required by statute of a public officer, is a public duty to be performed with reference to the interests of the community, and for the benefit of the public. Such an

¹ *McKee v. Commonwealth*, 2 Grant's Cases, 23.

² *People v. Edwards*, 9 Cal. 286, 292.

³ *McCracken v. Todd*, 1 Kan. 148, 168.

⁴ *Young v. State*, 7 Gill & J. 253, 261.

officer is in no respect responsible in damages for his official acts to the surety in a bond which he may have approved or rejected, for to such a surety he owed no duty, and of course, could violate none.¹

§ 51. Approval — Judicial or ministerial act? — The action of the proper officer, or board, or court, in accepting (or rejecting), and in case of acceptance, in approving an official bond, is judicial, and as the accepting officers are protected in acting upon their judgment, so the public is entitled to the like protection. Thus a sheriff and his sureties, having submitted a bond purporting to be an official bond to the board of supervisors for acceptance and approval, are bound by the decision of the board that the bond be accepted and approved, and its approval of the bond is final and conclusive as to the official character of the bond.²

§ 52. Same subject continued. — The duty of deciding upon the sufficiency of official bonds and accepting or rejecting them is held in Michigan, as we have seen, to be judicial; in Arkansas it is classed among ministerial functions, though often performed by judicial officers. In that state a statute which authorized any citizen and tax-payer to file exceptions, verified by affidavit, to the official bond of a sheriff, raise an issue, and have it decided by the circuit court, was held to be constitutional. The jurisdiction so conferred upon the circuit court is not such an intermingling of ministerial with judicial functions as to fall within the inhibition of that part of the constitution, which (in that state as in all others), separates the judicial from the executive branch of the government.³

¹ Held *v.* Bagwell, 58 Iowa, 139. See, also, Cooley on Torts, 379.

² Bay County *v.* Brock, 44 Mich. 45; Van Deusen *v.* Newcomer, 40 Mich. 90, 135; Raynsford *v.* Phelps, 43 Mich. 342. See, also, Held *v.* Bagwell, 58 Iowa, 139. But see § 52.

³ Oliver *v.* Martin, 36 Ark. 134.

§ 53. Approval of bond — Erasure. — It is the duty of officers entrusted with the authority to take and approve official bonds, to use ordinary care and prudence to protect the security, as well as to see, in the interest of the public, that the bond is valid and the securities sufficient. Whenever such facts occur as should put the officer upon inquiry as to the due and legal execution of a bond, he must make that inquiry. Thus, where a power of attorney authorizing the execution of an official bond, signed by a number of sureties, but with several names of persons who had signed it, erased, was presented to a judge, it was his duty to investigate the matter of the erasures, and ascertain whether they were made with the consent of the remaining sureties. Not having done so, the approval of the bond was improper and invalid and the bond itself void.¹

§ 54. Delivery and approval of the bond of a commercial corporation. — The delivery and approval of official bonds, strictly so called, as those of public officers, is usually prescribed by statute, the terms of which must be followed in order to fix upon the obligors the liability which they propose to assume. Whether the statute be mandatory, or merely directory, it forms the criterion by which the validity of the delivery and acceptance of the bond must be judged. This subject is elsewhere treated. With reference to bonds of a less strictly official character, such as those executed by the officers of private corporations, the general rule is, in the absence of statute, by-law, or resolution on the subject, that the delivery, approval, and acceptance of the bond by the corporation, through its accredited organs, must be proved like any other fact. Thus, where the minutes of the directors of a bank were silent on the subject of the cashier's bond, but having executed it with his sureties, he entered upon the duties of his office, and discharged them

¹ Bracken County, etc., *v.* Daum, 80 Ky. 388; Blakely *v.* Johnson, 13 Bush. 197; Hall *v.* Smith, 14 Bush, 604; Chamberlain *v.* Brewer, 3 Bush, 561.

for a number of years, and upon the insolvency of the bank, the bond made its appearance in the hands of the receiver, these facts were held to be sufficient evidence of the delivery, approval, and acceptance of the bond, and the sureties upon it were not permitted to escape their liability, on the ground that there had been no official recognition of the bond by resolution of the directors, or other formal proceeding on their part. The rule, the court says, may be formulated thus: "That the fact of the possession by the bank of such a bond, in due form, legally executed and complete in every respect, the officer having been allowed to enter upon his duties; is evidence which of itself will suffice to authorize a suit upon it as having been delivered, accepted, and approved with all requisite formality."¹

§ 55. Official bonds under authority of by-laws. — The making of by-laws is incident to every corporation. And where a corporation is created by statute for a particular purpose, and the power to make by-laws relative to the objects of the institution is given in express terms, this neither increases nor limits the power which the corporation would have without such express authority. Consequently, a corporation thus possessing the powers necessary to carry into effect the objects of its creation, can use the necessary means and require its officers and other agents to execute suitable bonds to secure the performance of their duties. It may prescribe the form of the bond, its terms, recitals, penalty and condition, the number of sureties required, and the tests of their sufficiency. And the construction of a bond executed under a by-law of this character must be reasonable, and cannot be strained even to effect the release of a surety. Thus, where the by-laws of a bank required its book-keeper to give bonds with two or more

¹ *Bostwick v. Van Voorhis*, 91 N. Y. 353; citing, *Bank of the United States v. Dandridge*, 12 Wheat. (25 U. S.) 64; *Graves v. Lebanon Bank*, 10 Bush (19 Am. Rep.), 50; *Morse, on Banking* (2d ed.), 235, and cases therein cited.

sufficient sureties, and the sureties only executed the bond, the book-keeper himself failing to join in it, the court held that they were bound by it. "They have voluntarily entered into it; it was not prohibited by any law, or against any general policy. Courts cannot indulge their private feelings where loss has happened to a surety; for it would be idle to take security in any case, if hardship could be a reason for not giving it its full effect. Beyond the letter of its obligation, it is not to be strained by any equity; but so far as they have bound themselves, courts cannot unbind them; for I understand the law to be this: if it was a bond which no law demanded, or, if demanded, it had not strictly conformed to the law; where the bond was given under no deception, under no mistake of the obligor, it is good as a bond at common law; and * * * where a statute gives a particular form * * * and there is another form which is to produce the same effect, this changes not the obligation, though it differ in circumstances, * * * and there is no provision in the act declaring it to be void unless the prescribed form is pursued. It is a valid obligation at the common law."¹ The rule is, that a (would be) official bond is void if the statute declares it to be so, otherwise it is valid as a common-law bond. "The statute is like a tyrant,—when he comes, he makes all void; but the common law is like a nursing father,—makes void only that part where the fault is, and preserves the rest."²

§ 56. Statutes directory to public officers.—Statutory orders to public officers are directory only. They are intended merely for the convenience of the administration and the security of public interests, and, consequently, form no part of the contract between the officer and the government. Hence it follows that the neglect of other officers to

¹ *Bank of Northern Liberties v. Cresson*, 12 Serg. & R. 306, 314.

² *Maleverer v. Redshaw*, 1 Mod. 35.

perform *their* duty in requiring the principal in an official bond to discharge *his* duty by rendering an account of his proceedings, forms no ground of defense for his securities against an action for a subsequent breach of their bond.¹

§ 57. Distinction between directory and mandatory statutes. — The distinction between mandatory and directory statutes is always important, and frequently forms a controlling element in solving the question whether a bond is valid as an official bond, good as a common-law bond, or absolutely void. It is held in a Michigan case that when the obligee of a bond prescribed by a statute is a mere nominal party from whom no duties are required, and upon whom no powers are conferred by the statute, who is named only because there must be a promisee, and a party in whose name to bring suit, the statute, so far as it designates such obligee, is merely directory. Therefore, a deviation from the terms of the statute in this respect, as in making the county instead of the state the obligee of the bond, does not destroy its character as an official bond, and it is as fully obligatory as it would have been had the terms of the statute been scrupulously complied with.²

§ 58. Same subject continued. — Where a collector granted a clearance to a vessel before taking the bond the supreme court of the United States said: “In our opinion the statute as to the time of granting the clearance and taking the bond is merely directory to the collector. It is undoubtedly his duty to comply with the literal requirements of the statute. If he neglect so to do, it is an irregularity which may subject him to personal peril and

¹ Sterns *v.* The People, 102 Ill. 540; United States *v.* Kirkpatrick, 9 Wheat. (22 U. S.) 720; United States *v.* Van Zandt, 11 Wheat. (24 U. S.) 184; United States *v.* Boyd, 15 Pet. (40 U. S.) 187; Jones *v.* United States, 18 Wall. (85 U. S.) 602; Ryan *v.* United States, 19 Wall. (84 U. S.) 514.

² Bay County *v.* Brock, 44 Mich. 45.

responsibility. If the state of facts has existed to which the statute provision is applicable, the authority to require and the duty to give the bond attaches; and by the voluntary consent of the parties it may well be given *nunc pro tunc*.¹ Similar rulings were made in other cases.² In one of them the court says, speaking of statutes which require the proper officer to recall a subordinate in the event of his official delinquency: "The provisions in both laws are merely directory to the officers, and intended for the security and protection of the government by insuring punctuality and responsibility; but they form no part of the contract with the surety."³

§ 59. Same subject continued. — Whether a statute is mandatory or directory is a question largely dependent upon its terms, the circumstances under which it was enacted, the exigency that called it into being, the persons upon whom it is designed to operate, and upon other circumstances. It is safe to say, however, that no law which requires of an official person the duty of examining and approving an official bond can be so far mandatory as that his neglect to discharge his duty can release the obligors in such bond from the liability they incur by its execution, if under it the office has been assumed and duty performed or neglected. In a proper case, as will be elsewhere shown, the officer may be entitled to a *mandamus* to compel the approval of his bond in order to his induction into office, but under no circumstances can the fact that the official examiner was remiss in his duty suffice to extinguish a bond which, so far as its obligors are concerned, is *opus operatum*, having been duly executed and delivered. And this, if upon no other principle, because *laches* cannot be imputed

¹ *Speake v. United States*, 9 Cranch (13 U. S.), 35.

² *United States v. Kirkpatrick*, 9 Wheat. (22 U. S.) 720; *United States v. Van Zandt*, 11 Wheat. (24 U. S.) 184.

³ *United States v. Van Zandt*, 11 Wheat. (24 U. S.) 184.

to the government, and under no circumstances can its interests be defeated or impaired by reason of the neglect of its agents.¹

§ 60. Same subject continued. — When a statute requires that an official bond be made payable to an officer designated in the statute, it is a sufficient compliance with the law to make the bond payable to the incumbent of the office by his proper name, with the addition of his office, as to "A. B., town clerk of said town," instead of "to the town clerk of said town."² And on the other hand, it has been held in Michigan, that although it is the proper and regular course to make the bond payable to the incumbent by name, with the addition of his official designation, the omission of the proper name, if a defect at all, is curable by amendment, and at any rate, the objection must be made before pleading to the merits.³

§ 61. Bonds with conditions in excess of the requirements of the statute. — It sometimes occurs that a bond prescribed by a statute, and required by it to be taken by a specified officer, is so drawn that it contains conditions in excess of those specified by the statute. In such a case, the question arises whether the bond is valid at all, and if so, to what extent. The law in such case seems to be settled, that if such a bond be voluntarily executed by its obligors, it is valid so far as it imposes obligations authorized by the statute, but the stipulations which are in excess of it, may be rejected as surplusage.⁴

If the penalty of a bond voluntarily given be larger than that prescribed by the statute, the bond is not void for that

¹ *United States v. Kirkpatrick*, 9 Wheat. (22 U. S.) 735.

² *Sutherland v. Carr*, 85 N. Y. 105.

³ *Berrien County Treasurer v. Bunbury*, 45 Mich. 79.

⁴ *United States v. Mynderse*, 1 Blatchf. (C. C.) 1; *Bowar v. Wilson*, 1 Bailey (S. C.), 461; *Treasurer v. Bates*, 2 Bailey (S. C.), 362; *Jameson v. Kelly*, 1 Bibb, 479; *State v. Findlay*, 10 Ohio, 51.

reason; it is valid to the amount of the statutory penalty, and void only as to the excess.¹ And if an officer's bond is in all other respects conformable to the statute, except that the penalty is for a smaller sum than the law requires, it is not invalid for that reason. Having been accepted by the proper officers, and the principal obligor having been inducted into his office on the faith of the bond, it does not lie in the mouths of him or his sureties to say, that because he and they are not bound for as much as they should have been, they are not bound at all.²

§ 62. Bonds irregular and defective. — Bonds intended to be official, are often irregular and defective, and many questions have arisen as to their validity. It was held in a case in which the principal failed to sign his official bond at all, although his name and the designation of his office were recited in it in due form, that his sureties were liable upon it; they having executed and delivered it in accordance with the statute, and there appearing no evidence that it was so delivered upon any stipulation or condition, that the principal should also sign it.³ This ruling manifestly proceeds upon the obvious supposition that the liability of the officer is in no respect dependant upon his execution of the bond; having been elected or appointed to the office and inducted into it, he is as fully responsible without any bond as he would be with one.

And upon the same principle, the validity of an official bond is in no degree impaired by the fact, that it is made payable to the "county" instead of the "State," "Commonwealth," or "People," according to the phraseology in use in the state in which it is executed. The only use of

¹ *State v. Rhoades*, 6 Nev. 352, 371; *Johnston v. Governor*, 2 Bibb, 186; ⁴ *Am. Dec.* 694; *McCaraher v. Commonwealth*, 5 Watts & S. 21; *Treasurer v. Bates*, 2 Bailey (S. C.), 362.

² *Grimes v. Butler*, 1 Bibb, 192.

³ *Trustees v. Scheik*, 10 Bradwell (Ill. App.), 51; *Smith v. Supervisors*, 59 Ill. 414; *Wildcat Branch v. Ball*, 45 Ind. 218.

having a payee at all, is to furnish a plaintiff in whose name suit can be brought upon the "relation," or to the "use" of the real plaintiff.¹

§ 63. Same subject continued — Common law bond. — The bond of an officer, so far falling short of the requirements of the statute as to be invalid as an official bond, may yet be obligatory as a common-law bond, unless prohibited by statute or against public policy. If, by virtue of the execution of such a bond, the principal was inducted into office, enabled to collect money as an officer, and became entitled to compensation for his services, these facts constitute a sufficient consideration for the promises and undertakings embodied in the bond, and whatever will support the promise of the principal, will support that of the sureties, who are, therefore liable on the bond, according to its tenor and effect.²

When a statute requires that the bond which it prescribes shall be payable to a named official, it is, nevertheless, good against the obligors, if it be made payable directly to the sovereignty of which the said official is the agent. Thus, a bond which should have been made payable to the Treasurer was instead made payable to the United States, and the court held that it was good at common law, and that the United States had the power, without the authority of a statute, to make a valid contract, become the obligee of a common-law bond, and enforce it by suit at law.³

When an official bond is authorized by statute, and no special form prescribed, a bond executed in pursuance of the statute will be upheld, unless the condition is in some

¹ *Huffman v. Koppelkom*, 8 Neb. 344; *Koppelkom v. Huffman*, 12 Neb. 95.

² *People v. Shannon*, 10 Ill. App. 364; *Pritchett v. People*, 6 Ill. (1 Gil.) 525; *Coons v. People*, 76 Ill. 383.

³ *Jessup v. United States*, 16 Otto (106 U. S.), 147; *United States v. Tingey*, 5 Pet. (30 U. S.) 115; *United States v. Bradley*, 10 Pet. (35 U. S.) 343; *United States v. Hodson*, 10 Wall. (79 U. S.) 395; *United States v. Linn*, 15 Pet. (40 U. S.) 290.

material respect contrary to public policy, or in contravention of law. And if the condition is that the principal shall perform the duties of "the office," it is immaterial whether technically under the laws of the state, there is such an "office" as that of a deputy sheriff at all. Such a condition may as well apply to the office of sheriff as to the office of deputy sheriff, and the obligors were equally bound, whether the deputyship were an office or a mere "place." Such a bond, therefore, conditioned for the due performance of the duties of a public office is valid, both as a common-law bond and an official statutory bond, there being nothing in it contrary to law or public policy.¹

§ 64. Voluntary or common-law bonds. — It very often happens that a bond, executed in consequence of a statute, and with the design, by conformity to its terms, of being a valid statutory or official bond, falls short of the statutory requirements, and fails to become a bond of that peculiar character. In such case, the question arises whether the bond so imperfect or defective is absolutely void, or valid as a common-law bond, irrespective of the design to impart to it a statutory and official character. The rule upon this subject is well stated in a recent case in Illinois. The court says: "We have several times held that an obligation entered into voluntarily, and for a sufficient consideration, unless it contravenes the policy of the law, or is repugnant to some provision of the statute, is valid at common law, notwithstanding the attempt may have been made to execute it pursuant to a statute with the terms of which it does not strictly comply."² And if a person holding such an official or trust position as might have caused him to be

¹ *Gradle v. Hoffman*, 106 Ill. 147.

² *Barnes v. Brookman*, 107 Ill. 317, 322; citing, *Pritchett v. People*, 6 Ill. 525; *Fournier v. Faggott*, 4 Ill. 347; *Ballingall v. Carpenter*, 5 Ill. 306; *Todd v. Cornell*, 14 Ill. 72; *United States v. Mason*, 2 Bond (C. C.), 183; *United States v. Linn*, 15 Pet. (40 U. S.) 290; *United States v. Tingey*, 5 Pet. (35 U. S.) 115; *Farmers, etc., Bank v. Polk*, 1 Del. Ch. 167.

required to give an official bond to secure the due performance of his duty or trust, shall of his own accord and voluntarily enter into a bond with securities, conditioned for a due discharge of his duties or trusts, such a bond is not an official bond, because it was not required by the terms of any statute, or, if so required, was not exacted by any court having jurisdiction of the matter; but it is, nevertheless, a valid common-law bond, because it is founded on a sufficient consideration, is not prohibited by statute, nor contrary to public policy. Thus, a guardian, whose official bond is smaller than it should be, may make a valid, common-law bond as a further security for the estate of his ward.¹ And so the bond of a sheriff, executed and delivered after the expiration or the time limited for that purpose, by the statutes of the state, is invalid as an official bond, but good as a common-law bond; and under it the sureties are bound to see that their principal discharges all the duties of his office.² And if an officer and his sureties, of their own accord, fix upon the amount of the penalty (within the prescribed limits), execute the bond, and deposit it with the proper custodian, it is not only good as a common-law bond, but, in Kansas, valid as a statutory bond, as well, although the proper court neither fixed the amount of the penalty nor approved the security.³

§ 65. Same subject continued. — When the statutes of a state prescribe the form of official bonds, a deviation from that form will deprive a bond of the character of being official, although it may be valid as a common-law bond. Thus the bond of a treasurer of a corporation payable to the corporation instead of the state as prescribed by the statute, is not an official bond, although good as a common-law bond between the corporation and the parties *executing* the bond.

¹ *Potter v. The State*, 23 Ind. 650.

² *Crawford v. Howard*, 9 Ga. 314.

³ *McCracken v. Todd*, 1 Kan. 148.

The insertion of the name of the principal in the body of the bond although done by his own hand, is not such an *execution* of it as will make him liable upon it. To execute a bond is to subscribe, seal and deliver it, and to subscribe a bond is to write one's name at the foot of it.¹

§ 66. Voluntary bonds — Rule in Mississippi. — In a Mississippi case a very reasonable distinction is taken between a merely voluntary bond and one which is intended to be a statutory or official bond, and which either from intrinsic defects or some other cause, fails to meet the requirements of the law. The latter, the court says, may in a proper case and upon sufficient consideration be held obligatory as a common-law bond, the former is simply void for want of consideration. In that state a seal does not import a consideration. It is incumbent, therefore, upon the party producing a bond to show its consideration, and if that cannot be done the bond will be held invalid. Thus the county treasurer of Neshoba county gave to the police board a bond conditioned to account for the common school fund of the county. This was required by no statute whatever, for an act prescribing such bonds had previously been repealed, so far as it applied to Neshoba and some other counties. The obligor was already treasurer, had given the ordinary treasurer's bond in due form, and there was, therefore, no consideration of any kind to induce him to execute the bond for the public school fund. The court concluded that, "the common law, as modified by our statute, will not sustain a bond, any more than a simple contract, without a sufficient consideration to support it."²

§ 67. Voluntary bonds — When void for want of consideration. — And where a statute provided that the warden of a certain prison (supplemental to the principal prison),

¹ Wildcat Branch v. Ball, 45 Ind. 213.

² State v. Bartlett, 30 Miss. 624.

should perform the same duties prescribed by law for the warden of the principal prison, but was not in terms required to give a bond, as was the warden of the principal prison, it was held that the bond executed by the warden of the supplemental prison, not being required by the statute, nor in any respect necessary to his title to his office was void for want of consideration, and was not valid as a common-law bond.¹ The rule on this subject is, that bonds the execution and exaction of which are authorized by statute and for any reason fail to be good statutory and official bonds, may nevertheless be enforced as valid common-law bonds. In such case there may well be a valid consideration for the bond.² But where a voluntary bond, authorized by no law whatever, is executed as an official bond, no consideration, therefor, passing to the obligor, it cannot be enforced.³ It should be borne in mind, however, that the rule is different in those states in which the consideration of a sealed instrument cannot be impeached in an action at law.

§ 68. Where there is no officer there can be no bond, valid either as official or voluntary. — The voluntary bond of an (alleged) officer, not executed in accordance with the terms prescribed by law is invalid, if no such office exists. A constable appointed by a trial justice, gave bond with security. The law did not authorize the justice to appoint a constable or take a bond, and the bond executed was otherwise irregular. It was held that the surety was not estopped by the terms of his bond from denying that the constable was a lawful officer, and that the

¹ *The State v. Heisey* 56 Iowa, 404.

² *Shepherd v. Collins*, 12 Iowa, 570; *Garrettson v. Reeder*, 23 Iowa, 21; *Postmaster-General v. Early*, 12 Wheat. (25 U. S.) 186; *Morse v. Hodsdon*, 5 Mass. 814; *State v. Heisey*, 56 Iowa, 404. But see *Barnes v. Webster*, 16 Mo. 258.

³ *State v. Heisey, supra*; *State v. Bartlett*, 30 Miss. 624. But see *State v. Harney*, 57 Miss. 863, in which under certain circumstances the validity of bonds unauthorized by statute is recognized.

appointment was valid. In a case of this character the principle that the surety of a *de facto* officer is liable upon his bond was held inapplicable, because there can be no *de facto* officer, incumbent of an office that does not exist. It may be remarked, however, that under the law of the state, in consequence of negligence of the legislature, there could not be at the time of the transaction in question any strictly lawful constable in the State.¹

§ 69. Failure to give bond — Dependent upon failure to require one. — If, under the statute of a state, it is the duty of an official person or board to require a bond of an officer after his election, he is in no default until after that requisition has been made upon him, and if the prescribed period shall have elapsed before he is called upon to give his bond; he may, nevertheless, execute such a bond after that time, as will preclude any vacancy of his office, and bind his sureties. It was so held upon full consideration in Vermont, the court saying that neither the officer, nor his sureties, could take advantage of his wrong, nor be permitted to say that the bond was invalid because it was not filed in due season, and that whether he was officer *de jure*, or officer *de facto*, or no officer at all, his bond was a valid common-law obligation against him and his sureties, not being in violation of the policy of the law, nor within the prohibitions of any statute.²

§ 70. Official bond of de facto officer. — It frequently happens that offices are filled by persons who are not entitled to them, officers *de facto* and not *de jure*. “An officer *de facto*, is one who has the reputation of being the officer he professes to be, but is not a good officer in point of law.”³ Such a person is not a mere usurper, but to be

¹ *Tinsley v. Kirby*, 17 S. C. 1, 8, 9.

² *Weston v. Sprague*, 54 Vt. 395, and cases cited.

³ *Parker v. Kett*, 1 Ld. Raymd. 658; *The King v. Corporation of Bedford Level*, 6 East, 368.

a *de facto* officer, he must have some sort of color of right, or appointment, or election, under which he exercises the functions of the office. It becomes a question therefore, whether the bonds which may be executed by these spurious officers and their sureties are, properly speaking, official bonds and to what extent their obligors are responsible upon them. The question is to a great extent answered by stating a well established principle of law with reference to that class of officers. The acts of a *de facto* officer are valid as to the public and third persons.

This rule, together with the law of estoppel which precludes the surety of an officer from denying the official character of his principal as recited in his bond, is sufficient to authorize the assertion, that the official bond of a *de facto* officer, is precisely the same as the official bond of a *de jure* officer *quoad* everybody likely to have an interest in the subject. Accordingly, it has been held in Illinois, that the official bond of a *de facto* justice of the peace is an obligatory instrument.¹ And upon the same principle in Alabama, the surety of a *de facto* guardian was held responsible on his bond for funds of the ward's estate, for which the guardian had been held trustee *in invitum*, the appointment as guardian being held void, but why so held does not very clearly appear in the report of the case.²

§ 71. Same subject continued. — In Tennessee a person who, being a defaulter, was ineligible to the office of sheriff, was nevertheless elected, gave bond and was inducted into the office. He again defaulted, and an action was brought upon his bond against him and his sureties. The court held that the election of the sheriff was void and his induction into the office illegal, that he did not become sheriff *de jure*, but by intruding into the office and assum-

¹ *Green v. Wardwell*, 17 Ill. 278.

² *Corbitt v. Carroll*; 50 Ala. 815. See also *Ford v. Clough*, 8 Me. 334.

ing its duties he became sheriff *de facto*, and that those who voluntarily bound themselves for the faithful performance of his duties, could not absolve themselves from their obligations by insisting that he was no sheriff.¹

And a person irregularly in possession of an office, and liable to be denuded of his trust, because he had not, within the limited period, executed the prescribed bond, nevertheless did execute and deliver a bond with security properly conditioned, before any proceedings were commenced to oust him from his position. This bond was accepted by the officials, whose duty it was to pass judgment upon the sufficiency of such bonds. By this acceptance the state waived all defects and delinquency in the execution of the bond, which was sustained as valid, although so far irregular that it could be regarded only as a common-law bond. And, although the principal was a *de facto* officer, the sureties were held responsible for his acts, and liable upon the bond.²

§ 72. When the obligation of an official bond takes effect.—The obligation of an official bond takes effect from the date of its execution and delivery or acceptance. The obligors then promise and bind themselves to pay the penalty of the bond upon the contingency set forth in the condition. Then the debt is created, *quoad* third persons, and *quoad* each other, the obligors then become bound, and consequently all the rights deducible from the instrument relate back to the execution of the bond. Thus, an officer who executed an official bond *before* the enactment of a homestead law, and gave a mortgage upon his house and lot to indemnify his sureties, was not entitled to the benefit of the

¹ Jones Gov. v. Scanland, 6 Humph. 195; 44 Am. Dec. 300; citing, United States v. Maurice, 2 Brock. 97, 113. See, also, State v. Wells, 8 Nev. 105; State v. Rhoades, 6 Nev. 352.

² State v. Cooper, 53 Miss. 615.

homestead act, although the breach of the bond took place after it went into effect.¹ And this because official bonds like other deeds, take effect from their delivery, and not from the breaches of their conditions.

§ 73. Delivery of official bond—Effect upon its operation.—What constitutes such delivery is in some measure controlled by the statute. Ordinarily a deed is said to be delivered when it passes out of the possession and control of the grantor, and depositing it in a post-office addressed to its obligee, is such a delivery. Under the acts of congress, however, the bond of a deputy postmaster is not delivered so as to bind its obligors until it has reached the hand of the Postmaster-general, and been approved by him.² A different rule prevails as to the bonds of collectors of the customs. Such bonds become operative from the moment when the collector and his sureties part with it in the course of transmission. The court says: “A bond may not be a complete contract until it has been accepted by the obligee, but if it has been delivered to him to be accepted, if he choose to do so, that is not a conditional delivery which will postpone the obligor’s undertaking to the time of its acceptance, but an admission that the bond is then binding upon him, and will be so from that time if it shall be accepted. When accepted it is not only binding from that time forward, but it becomes so upon both from the time of the delivery. That is the offer which the obligor makes when he hands the bond to the obligee, and in that sense the obligee receives it.”³

¹ *Bryant v. Woods*, 11 Lea (Tenn.), 327; *Eberhardt v. Wood*, 6 Lea (Tenn.), 467; *s. c.*, 2 Tenn. Ch. 490, 494; *Johnson v. Harney*, 84 N. Y. 363. See *ante*, § 45.

² *United States v. Le Baron*, 19 How. (60 U. S.) 73; *s. c.* 4 Myers Fed. Dec. §§ 256, 261.

³ *Broome v. United States*, 15 How. (56 U. S.) 143, 154; *s. c.* 4 Myers Fed. Dec. §§ 556, 561.

§ 74. Same subject continued.—And under the law of Pennsylvania, a similar ruling was made in the case of a collecting officer. On the day that he “gave the bond,” he received \$384 public money, and the court held that, in the absence of evidence as to the time of day that the bond was “given,” and the time that the money was collected, the bond should be held to cover the whole day’s receipts, and this, although he had been previously acting under another bond. The court in this case having no *data* upon which to found a division of the day, referred the operation of the bond to its beginning.¹

§ 75. Official bonds may be made retrospective and retroactive.—It lies within legislative power to determine what officers charged with ministerial duties shall be required to furnish official bonds, the penalty, condition, and obligation of such bonds, and the qualification of the sureties who are to join in their execution. Before such bonds have validity, or a legal consideration, which will support them, their execution must be required by statute as a condition precedent to the lawful exercise of an office or the enjoyment of its emoluments. And without such statutory provision, they would be voluntary and gratuitous, and at common law, void.² As to bonds strictly official, the power of the legislature is very full and complete. Not only can it prescribe the conditions of bonds to be given by officers to be indicated after the passage of the statute, but it may impose upon persons in office under bonds conforming to pre-existing law, the duty of giving further or supplementary bonds. And statutes of this character are not invalid on account of their retrospective character. While it is true that retrospective statutes are not usually favored, they will be enforced when by their terms they show a clear legislative intent that they shall have a retrospective opera-

¹ *Miller v. The Commonwealth*, 8 Penn. St. 444.

² *Ex parte Bulkley*, 53 Ala. 42; *State v. Bartlett*, 30 Miss. 624.

tion. And especially is this the case, where they are of a remedial character, tending to promote public justice, correct innocent mistakes, cure irregularities and advance equitable principles. Of this character was held to be an Alabama statute, which prescribed new and more stringent qualifications for the sureties on official bonds, and a course of proceeding by which the sufficiency of the sureties should be tested, and if found wanting, a vacancy in the office should be declared. And, further, that it was competent to apply this statute to probate judges, sheriffs, and other officers already in office under bonds duly approved and accepted in accordance with the law in force when the bonds were executed, and to subject the qualifications of their sureties to the tests prescribed by the statute enacted after the execution of the bonds.¹

§ 76. The spoliation of a bond which will invalidate it. — The spoliation, or alteration of a sealed instrument by a stranger, does not impair its validity, but where the penalty of an official bond was, after its delivery and acceptance, changed from twenty-five hundred to twenty-five thousand dollars, with the knowledge and consent of the selectmen of the town of which the principal obligor was treasurer, such alteration is not spoliation by a stranger, but an act of the accredited financial agent of the beneficiaries, the people of the town, and obligatory upon them. And bringing suit upon the bond for twenty-five thousand dollars is a ratification of the alteration, and such alteration so ratified, operated a total release of the sureties, so that no recovery could be had against them either for the greater sum or the less.²

§ 77. Dual character of an official bond. — While it is true that an official bond is a contract as well as a bond, it

¹ *Ex parte Bulkley*, 53 Ala. 42.

² *Dover v. Robinson*, 64 Me. 183.

does not follow from that fact that the legal incidents of the instruments are separable, and that in a suit upon it the plaintiff can say that he sues upon it in its character of contract, rather than in that of bond, and that for this reason the defendant is deprived of the defense that an action upon it, regarded as an official bond, is barred by the statute of limitations. All bonds are contracts, but all contracts are not bonds, and although an instrument may be both bond and contract, it is not necessarily separable so that a suit can be brought upon it rather in one capacity than the other. If, therefore, the limitations of actions on official bonds is by statute less than that on ordinary contracts, the statute may be relied upon to defeat any action upon the instrument, although the paper declared on be both bond and contract.¹

§ 78. Measure of liability on official bond for money received by the officer. — The liability of an officer on his official bond, as well as that of his sureties, is controlled by the terms of the bond, the nature of the office, and the character of the duties to be performed by him. Thus, if his duty is to keep safely, and disburse legally a specific fund, any conversion of that fund is a breach of his bond, and will sustain an action; but if (as in Indiana is the case with township trustees) the officer becomes in a technical, as well as a general sense, the owner of the money received by him, and is responsible, as a banker is, for money deposited on general account, the mere conversion is not a breach of the bond, but to sustain an action there must be averred and proved, not only a conversion of the fund, but, also, a demand by competent authority, and a failure to pay.²

¹ State ex rel. *v.* Foulks, 83 Ind. 374.

² Bocard *v.* State, 79 Ind. 270; Morbach *v.* State, 28 Ind. 86; State *v.* Hebel, 72 Ind. 361; Morbeck *v.* State, 34 Ind. 308; Robbins *v.* Cheek, 32 Ind. 328; Rock *v.* Stinger, 86 Ind. 346; Shelton *v.* State, 53 Ind. 331; Lenville *v.* Leininger, 72 Ind. 491; Brown *v.* State, 78 Ind. 239.

§ 79. Same subject continued. — It is certainly a rule of law that the performance of an express contract is not excused by anything occurring after the contract is made, but a distinction must be taken between an absolute agreement to do a thing, and a condition to do the same thing inserted in a bond. In the latter case the obligor, in order to avoid the forfeiture of his obligation, is not bound at all events to perform the condition, but is excused from its performance when prevented by the law or an overruling necessity. Hence the sureties of an officer, who, while in the discharge of his official duty, was shipwrecked and drowned, are not responsible for the public money in the possession of the officer which was lost by the same calamity that destroyed his life.¹ In this respect, however, a distinction is to be taken in the duties and description of different officers. The liability of certain officials concerned in the custody of the revenue of the United States is held to be that of insurers. They are bailees of the government, undoubtedly, but by their bonds they insure the safe keeping and prompt payment of the public money which comes to their hands. Their obligations are not less stringent than that of a common carrier, and in some respects are greater.² Upon the receipt of the public money such officers become indebted to the government for the amount, and their liability for it seems to be absolute. Among these officers are receivers of public money, arising from the sale of public lands, and United States depositaries in general. In the case of an officer of the former description, it was held, that by his bond he insured the safe keeping and full payment of the public money in his hands, and that his sureties were not exoner-

¹ *United States v. Humason*, 6 Sawy. C. C. 199; *United States v. Thomas* 15 Wall. (82 U. S.) 837; *s. c.* 4 Myers Fed. Dec. §§ 266, 273; Coke Litt. 206 (a); 2 Blackst. Comm. 340.

² *Bevans v. United States*, 13 Wall. (80 U. S.) 56.

ated by the fact that he died defending the public funds in his hands against an irresistible force.¹

§ 80. Construction of official bonds—Effect of recitals.—Under the *strictissimi juris* rule, which protects securities, their obligations cannot be extended by construction beyond their specific engagements. The rule is, in such a case, that the recital controls the condition, and precludes a liability indicated by the latter, but inconsistent with the former. Thus, a bond was executed by sureties for the book-keeper of a bank, which recited his appointment as book-keeper, and that he had accepted the appointment; and the condition was that he should discharge the duties and trusts assigned to him as book-keeper, *and* also the duties of any other office, relating to the business of the bank, which he “shall undertake to perform.” The book-keeper was blameless as book-keeper, but, having been made teller of the bank, defaulted, in that capacity, to the amount of \$2,700. A suit having been brought upon the bond, the court held that the “recital in such bonds, undertaking to express the precise intent of the parties, controls the condition or obligation which follows, and does not allow it any operation more extensive than the recital, which is its key.” Upon this principle, the court, “not without some hesitation and doubt,” held that the sureties were responsible only for the good conduct of the book-keeper as book-keeper, and, notwithstanding the terms of the condition, were not bound for his good faith when acting in any other capacity.²

§ 81. Effect of subsequently enacted statutes.—It has been questioned whether the liability of the obligors of

¹ United States *v.* Watts, 1 New Mex. 553.

² Nat. Mech. Bk. *v.* Conkling, 90 N. Y. 116; London Assurance Co. *v.* Bold, 6 Ad. & El. (N. S.) 514; Hassell *v.* Long, 2 M. & S. 363; Pearsall *v.* Summersett, 4 Taunt. 593; Peppin *v.* Cooper, 2 B. & A. 431; Barker *v.* Parker, 1 Term, 287; Liverpool, etc., *v.* Atkinson, 6 East, 507. See *post*, Ch. VI.

an official bond is affected by statutes enacted after the execution of the bond ; it is certainly true that an official bond covers whatever duties were imposed before it was given, although such duties may have been added after the enactment of the law which prescribed the terms of the bond. Thus, a county treasurer's bond, requiring him to receive and account for "all moneys which shall come to his hands, as treasurer," imposes upon him liability for the proceeds of a tax, which the county held as trustee for the townships and other subordinate municipalities of the county. The court said : "The fact that the tax on the liquor traffic was for the first time imposed after this statute, which fixed the condition of the treasurer's bond, was passed, is of no moment ; the tax was provided for before this bond was given, and the sureties must be supposed to have had in view, when they signed the bond, all duties which existing statutes imposed on their principal."¹ And in North Carolina it is the law that, where a statute requires a bond from an officer for the faithful discharge of his duties, and a new duty is afterwards attached to the office by statute, such bond given *subsequently* to the latter statute, embraces the new duty, and is a security for its performance. This is undoubtedly the rule, unless the statute requiring the new duty, itself prescribes the bond or other security, necessary to secure the performance of the new duty.²

§ 82. Approval of bond may be waived by beneficiary. — If a statute, in prescribing that a bond shall be given in certain legal proceedings, as for an appeal, and requires that such bond, to be valid, shall be approved by the court, it is nevertheless competent for the party in interest to

¹ Marquette County *v.* Ward, 50 Mich. 174, 177.

² State *v.* Bradshaw, 10 Ired. (N. C.) 229, 232; Cameron *v.* Campbell, 3 Hawks., 285; Crumpler *v.* Governor, 1 Dev. 52; Governor *v.* Barr, 1 Dev. 65; Governor *v.* Matlock, 1 Dev. 213.

waive such approval, and if that waiver be duly made to appear, the bond is fully as valid and obligatory as it would have been if the statute had been literally followed.¹

§ 83. Rule as to presumption of acceptance and approval of bond. — In North Carolina a distinction has been taken between the bond of an officer, payable to the state, which enures to the benefit of private persons, and one that is exclusively for the performance of duties which concern the public only. In the former case, the court says, acceptance by the state cannot be presumed, in the absence of any evidence of actual delivery and full compliance with the requirements of the law. In the latter case, the whole benefit of the official action enuring to the state as a body politic, the state will be presumed, upon well known principles, to accept that which is manifestly to its advantage. The rule that, from the benefit to the obligee acceptance is to be presumed, applies with as much reason to the state as to a private person. Hence, a bond payable to the state, for the collection of certain taxes to be exclusively devoted to specific public purposes, was held to be valid against its obligors, although the case had not arisen when the county court could legally accept the bond. For that reason it was not a statutory bond, but was good as a voluntary bond.²

private contract. — The operation of an official bond cannot be affected by any contract or conditions entered into or agreed upon by the several obligors unless such contract or agreement has been accepted by the officer whose function it is to judge of the sufficiency of the bond and to approve it if satisfactory.³

¹ *Easter v. Acklemire*, 81 Ind. 163. See, also, *Ham v. Greve*, 14 Ind. 531; *Jones v. Droneberger*, 23 Ind. 74; *Smock v. Harrison*, 74 Ind. 348.

² *State v. McAlpin*, 4 Ired. (N. C.) L. 140.

³ *McKee v. Commonwealth*, 2 Grant's Cases, 23, 24.

§ 85. Official bond unnecessarily specific, valid. — When the condition of a bond is more specific than the statute requires, it is nevertheless good as a statutory or official bond, and consequently the summary remedies by motion or otherwise authorized by statute law are available to enforce it.¹

§ 86. Differences between official and voluntary bonds — As to remedies. — A material distinction between an official bond, properly so called, and a common-law or voluntary bond, is that the remedies specially provided by statute for the enforcement of the former can not be used for the latter, judgments by motion and similar modes of expediting the collection of debts due upon statutory bonds, are wholly unavailable in case the bond, although intended to conform to the statute, falls short of its requirements. Upon the same principle, a bond good at common law, but defective as a statutory bond, can not be sued upon by the governor, as successor to a former governor to whom officially, it was made payable.²

§ 87. Bonds required of a person exercising a privilege or franchise are official. — An auctioneer's bond has been held in an old case to be intended as well for the security of his private customers as for his indebtedness to the state, and this principle may be regarded as universal in all cases involving the bonds of officers, the discharge of whose duties affect the interest of individuals. Whenever a government requires security of a person exercising a privilege or franchise for his own profit, such security inures to the benefit of all who use the services of the person who is thus privileged.³

§ 88. Limitation of official bonds as to time of operation — If an official bond contains no limitation of time,

¹ *Boring v. Williams*, 17 Ala. 510, 516.

² *Governor v. Twitty*, 1 Ired. (N. C.) 153; *State Bank v. Twitty*, 2 Hawks, 1.

³ *Lea v. Yard*, 4 Dallas (4 U. S.), 96, 106.

as to the liability of the officer, it is to be construed as limited by the duration of the office. If the officer is chosen for one year his bond covers his defaults for that year, and the accidental circumstance that the officer is re-elected cannot extend the obligation of the bond.¹ It has, however, been held that when a bond was for the faithful performance, etc., "as long as he should continue in that office," such a bond was obligatory upon a deputy sheriff and his sureties for defaults committed during a second term of the principal sheriff, because, although the sheriff had been re-elected, the deputy had not been re-appointed. His service was continuous, there had been no point of time when the principal was out of office, and as the deputy had not been removed his service was uninterrupted. In a New York case the court (Kent, Ch. J.), says: "It was not necessary to re-appoint Smith in order to constitute him under sheriff. He had no concern with the renewal of the plaintiff's commission so long as there was an unbroken continuation of the plaintiff's authority."²

§ 89. When the failure to renew bonds of officers of private corporations will not implicate directors.—In the event of a disaster in consequence of the non-renewal of the bond of an officer of a private corporation, the question arises, who is responsible for the loss. In a Tennessee case a bill was filed by a stockholder of an insurance company to hold the directors responsible for the amount lost by the defalcation of their secretary in the third year of his incumbency. He had given a bond upon his first election and having been twice re-elected gave no other bond, the

¹ *South Carolina Society v. Johnson*, 1 McCord, 41, 46; 10 Am. Dec. 644; citing, *Wright v. Russell*, 3 Wilson, 530; *Barker v. Parker*, 1 Term. 287; *Strange v. Lee*, 3 East, 484; *Pro. Liv. Wat. Works v. Harpley*, 6 East, 507; *Commrs., etc., v. Greenwood*, 1 Dese. Ch. (S. C.) 450; *So. Ca. Ins Co. v. Smith*, 2 Hill (S.C.), 589, 591; *Wilmington v. Horn*, 2 Harr. 190.

² *Hughes v. Smith*, 5 Johns. 168, 173.

directors erroneously believing that the bond in question was a continuing bond. The court said that the directors were not personally liable as they could not be charged with neglect of their duties nor with bad faith. The only imputation that could be sustained against them was that they acted under a mistake of law, and this the court said could not render them personally liable, although they had not taken the advice of counsel.¹

Vance v. Phœnix, etc., Co., 4 Lea (68 Tenn.), 885.

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CHAPTER III.

NEGOTIABLE BONDS — INCIDENTS OF.

SECTION 100. Incidents of negotiable bonds — Generally.

101. Negotiability of corporation bonds of recent growth.
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103. *Bona fide* holder of negotiable bond unaffected by any equities, or by the bad title of his vendor.
104. What is good faith of a holder of a negotiable bond?
105. Rule as to negligence — As to bonds acquired by theft.
106. Persons dealing with agents or corporations charged with notice — Of what?
107. Special characteristics of bonds issued by municipal corporations.
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109. What law enters into the contract of negotiable municipal bonds.
110. Holders of negotiable municipal bonds must risk the authenticity of their bonds.
111. *Bona fide* holders of county bonds not charged with notice of financial condition of county.
112. Duty of holder of bonds to see that the power to issue them existed — Absence of power distinguished from defective exercise of power.
113. The source of power to issue municipal bonds — By whom such bonds must be issued.
114. General powers to issue bonds — Recitals necessary.
115. Holder of bonds charged with notice of limitation of powers — Rule of construction.
116. Summary of the characteristics of negotiable bonds.

§ 100. **Incidents of negotiable* bonds generally.** — Absolute bonds for the payment of money without penalty condition, or contingency are at this day very seldom executed by private persons, having been in a great measure superseded by bills of exchange, promissory notes, and other forms of negotiable paper. Vast sums of money, however,

are represented by the bonds of corporations political, municipal, or commercial, but although they are usually couched in the time-honored *formulae* of the common-law bond, and always authenticated by the seal of the obligor corporation, they are bonds only in name, and the incident or accident of the seal. Not only are they negotiable, passing from one person to another by indorsement, but usually they pass by mere delivery, and vest in each holder the immunities from equitable defenses enjoyed by the owner of commercial paper, acquired by purchase for a valuable consideration, before maturity, in due course of trade and without notice.¹ And not only are bonds of this character negotiable in the fullest sense of the term, but so, also, are the interest warrants or coupons equally negotiable in the hands of the holder of the bonds to which they were attached, or in the hands of any other person. And such coupons bear interest after maturity like any other commercial paper.²

And it has even been decided that coupons for interest bear interest after maturity, although no demand of payment has been made, and this, it is said, is the law, even if the coupons by their terms are payable on a fixed day at a specified place. And an action may be maintained on such coupons or upon bonds payable, like them, at a specified time and place, without either allegation or proof of demand and refusal of payment at the fixed time and place.³ It

¹ *White v. Vermont, etc., Co.*, 21 How. (62 U. S.) 577; *Gelpeke v. Dubuque*, 1 Wall. (68 U. S.) 175; *Meyer v. Muscatine*, 1 Wall. (68 U. S.) 384; *Murray v. Lardner*, 2 Wall. (69 U. S.) 110; *Thompson v. Lee County*, 3 Wall. (70 U. S.) 327; *The City v. Lamson*, 9 Wall. (76 U. S.) 477; *Beaver County v. Armstrong*, 44 Penn. St. 63; *Clark v. City*, 10 Wis. 140; *Craig v. Vicksburg* 31 Miss. 217; *Spooner v. Holmes*, 102 Mass. 503; *Griffin v. Burden*, 35 Iowa, 138; *Blake v. Supervisors*, 61 Barb. 149.

² *North Penn. etc., Co. v. Adams*, 54 Penn. St. 94; *Aurora v. West*, 7 Wall. (74 U. S.) 82; *San Antonio v. Lane*, 32 Tex. 405; *Mills v. Jefferson*, 20 Wis. 50.

³ *Longston v. South Carolina, etc., Co.* 2 S. C. 248;

may well be doubted however whether, upon full consideration either of these propositions would be sustained. The engagement of the obligor in such case is to pay at the specified time and place, and, unless a demand is then and there made, a default of payment cannot be established, and without that, interest does not accrue, nor does a cause of action arise.

§ 101. Negotiability of corporation bonds of recent growth. — The negotiability of this class of securities is of recent growth, for as late as 1857, in Maine, the highest tribunal of that state, denied to the coupons, or interest warrants of bonds issued by railroad corporations, the quality of negotiability, and decided that the holder of such paper was subject to all the equities which could affect such securities in the hands of the original payee. The coupon in judgment was not payable either to order, or to bearer, it is only a promise of the railroad company to pay "thirty dollars on this coupon at the office," etc. It referred to a certain bond by number, but had never been attached to it. The court admits that railway bonds, payable to bearer, with coupons attached, are negotiable instruments, but denies that the coupons when detached are, or can be made negotiable, except by legislative interposition, or a distinct expression of such intention by the party issuing them, on the face of the coupon itself.¹

And, in 1861; in Pennsylvania, the supreme court of that state, held very distinctly and with great earnestness, that neither the bonds of counties issued in aid of railroads, nor the coupons attached to them, were negotiable instruments; that bonds of that character could not be referred to the law merchant, nor controlled by it; that such bonds "are temporary and will never be repeated again while the world stands — (!); that they are but *bonds*, and even in

¹ Myers v. York, etc., Co., 43 Me. 239.

the hands of innocent and remote purchasers, they are subject to the equities existing against them when in the hands of the first purchasers.¹ It is believed that these rulings are exceptional, and that the doctrine which they controvert is too firmly established to be shaken, and is, in fact, the settled law of the land.

§ 102. When holder cannot make a bond in his hands negotiable — Blanks — Uncertainty.—A bond which is not negotiable because of an omission which can be supplied by the maker thereof, cannot be rendered negotiable by any other person than the maker, or one duly authorized by him. Thus a bond was issued, in which two places of payment, London and New York, were specified in the body of the instrument; in the former so many pounds sterling, in the latter so many dollars, were to be paid, and one of these places was to be selected by the president, and indorsed upon the bond by him. He made the indorsement and signed it, but omitted to fill the blank left for the place of payment. The bond was stolen while in this condition and passed into the hands of an innocent and *bona fide* holder, and it was decided that he was not authorized to fill the blank, and that he had acquired and could convey no title to the bond.² And the same decision was made by the supreme court of the United States, in a case involving other bonds of the same issue. The court further said, that in the absence of the required indorsement, the amount to be paid was uncertain, and that uncertainty deprived the bonds of the character of negotiability; and further, that with the unfilled blank before him, the purchaser had notice of the invalidity of the bond, and, consequently, could not be held to be a *bona fide* holder without notice.³

¹ Diamond *v.* Lawrence Co., 37 Penn. St. 353, 358.

² Ledwich *v.* McKim, 53 N. Y. 307.

³ Parsons *v.* Jackson, 9 Otto (99 U. S.), 434.

§ 103. Bona fide holder of negotiable bond unaffected by any equities, or by the bad title of his vendor. — If, however, a bond be unquestionably negotiable, its purchaser for value paid in good faith, is unaffected by the want of title in the vendor. And in such case the burden of proof as to good faith falls upon him who assails the possession. Negotiable paper in this respect stands upon the same footing as bank notes and coin. Lord Mansfield said: “The law is settled that a holder coming fairly by a bill or note has nothing to do with the transaction between the original parties, unless, perhaps, in the single case, which is a hard one, but has been determined, of a note for money won at play.”¹

§ 104. What is good faith of a holder of a negotiable bond? — What state of facts should be deemed inconsistent with the good faith required of a holder of negotiable paper was not settled by the earlier decisions. Lord Kenyon said in effect that the bad title of the vendor of a bill must be proved to have been known to the purchaser or it could not defeat his title, and that a banker could not be held bound to make inquiry concerning every bill brought to him to discount.² In a later case Abbot, Chief Justice, held, that it would be sufficient to defeat the title of a purchaser of a bill from one who had no right to it, to show that the purchaser took it under circumstances which ought to have excited the suspicion of a prudent and careful man.”³ This, it will be observed, in effect overrules the decision of Lord Kenyon, but in a series of later cases was itself overruled.⁴ In *Goodman v. Harvey*, Lord Denman said: “I believe we are all of opinion that gross negligence only

¹ *Peacock v. Rhodes*, 2 Douglass, 633. See, also, *Miller v. Race*, 1 Burr. 452; *Grant v. Vaughn*, 3 Burr. 1516; *Anon.*, 1 Salk. 126.

² *Lawson v. Weston*, 4 Esp. 56.

³ *Gill v. Cubitt*, 3 Barn. & Cr., 466.

⁴ *Crook v. Judis*, 5 Barn. & Ad. 909; *Backhouse v. Harrison*, 5 Barn. & Ad. 1098; *Goodman v. Harvey*, 4 Ad. & El. 870.

would not be a sufficient answer, where the party has given a consideration for the bill. Gross negligence may be evidence of *mala fides*, but it is not the same thing. We have shaken off the last remnant of the contrary doctrine. Where the bill has passed to the plaintiff without any proof of bad faith in him, there is no objection to his title."

In this country there has been a similar contrariety of decisions, but there is a large preponderance on the side of the rule laid down by Lord Denman in *Goodman v. Harvey*.¹

The rule as stated by the best of the American authorities is this:—

The possession of a negotiable instrument carries the title with it to the holder. The possession and title are one and inseparable.

The party who takes it before due for a valuable consideration, without knowledge of any defect of title, and in good faith holds it by a title valid against all the world.

Suspicion of defect of title or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker, at the time of the transfer, will not defeat his title. That result can only be produced by bad faith on his part.

The burden of proof lies on the person who assails the right claimed by the party in possession.²

§ 105. Rule as to negligence — As to bonds acquired by theft. — From these principles, thus settled, it results that a purchaser in good faith, in due course of trade, or, as the same idea is sometimes expressed in open market, or in the usual course of business, is in no degree bound to make a critical examination of the title to negotiable paper, in order to escape the imputation of bad faith in the pur-

¹ See *Swift v. Tyson*, 16 Pet. (41 U. S.) 1; *Goodman v. Simonds*, 20 How. (61 U. S.) 343; *Bank, etc., v. Neal*, 22 How. (63 U. S.) 96.

² *Murray v. Gardner*, 2 Wall. (69 U. S.), 110, 121.

chase.¹ And his title will not be impaired by negligence, however gross, for such negligence, although it may be evidence of fraud, is not fraud.² And however flagitious may have been the conduct of the vendor in obtaining the negotiable bonds or bills, even if he had stolen them, the title of the vendee is in no degree affected thereby, provided he did not participate in the fraud. His title to the stolen bonds is good against the original owner.³

§ 106. Persons dealing with agents or corporations, charged with notice — Of what? — The broad doctrines enunciated in the preceding sections must be qualified when the holder of negotiable bonds has been dealing with a corporation through its agents. Whoever deals with corporations must take notice of whatever is contained in the law of their organization, and are presumed to be informed as to the restrictions and conditions annexed to the grant of power, by the law which authorizes the corporation to act.⁴ And one who takes a negotiable note or bill of exchange, purporting to be made by an agent, is bound to inquire as to the power of the agent. If he deals with the agent of the government, he must look to the statute under which the agent professes to act, and see for himself that his contract comes within the terms of the law. The same rule applies, with at least equal force, if he is dealing with the agent of a corporation, for the corporation is bound only when its agents keep within the limit of their author-

¹ Welch *v.* Sage, 47 N. Y. 143; *s. c.*, 7 Am. Rep. 428.

² Seyhell *v.* National, etc., Bank, 54 N. Y. 488.

³ Carpenter *v.* Romnell, 5 Phila. 34. See, further, on this subject, generally, Leavitt *v.* Dabney, 7 Robt. (N. Y.) 350; *s. c.*, 37 How. Pr. 264; *s. c.*, 3 Abbott (N. S.), 469; Spooner *v.* Holmes, 102 Mass. 503; *s. c.*, 3 Am. Rep. 491; State *v.* Wells, 15 Cal. 336; Texas *v.* White, 7 Wall. (74 U. S.) 700; *s. c.*, 25 Tex. 465.

⁴ Selliman *v.* Fredericksburg, etc., Co., 27 Gratt. 119, 130. See, also, Pearce *v.* Madison, etc., Co., 2 How. (43 U. S.) 441; Zabriskie *v.* Cleveland, etc., Co., 23 How. (64 U. S.) 381.

ity.¹ Negotiability will not validate obligations which are not binding, for want of power to issue them.²

§ 107. Special characteristics of bonds issued by municipal corporations.—While all this is very true, it is equally true that the adjudications of the supreme Court of the United States, have invested bonds issued by the officers of municipalities, with anomalous and peculiar immunities, to which the ordinary doctrines of the law of commercial paper, as the test of the rights and liabilities of the parties to such instruments, do not apply.³ These rulings may be resolved into two propositions, the first of which is in the language of Mr. Justice Swayne: “When a corporation has power under any circumstances to issue negotiable securities, the *bona fide* holder has a right to presume that they were issued under the circumstances which give the requisite authority, and they are no more liable to be impeached for any infirmity in the hands of such a holder, than any other commercial paper.”⁴ The second of these propositions is thus stated by Mr. Justice Grier: “We have decided that where the bonds on their face, import a compliance with the law under which they were issued, the purchaser is not bound to look further.”⁵

¹ *The Floyd Acceptances*, 7 Wall. (74 U. S.) 680; *Clark v. Des Moines*, 19 Iowa, 119.

² *Starin v. Genoa*, and *Gould v. Sterling*, 23 N. Y. 452, 464.

³ See *Bissell v. Jeffersonville*, 24 How. (65 U. S.) 287; *Moran v. Miami Co. 2 Black* (67 U. S.), 722; *Woods v. Lawrence Co.*, 1 Black (66 U. S.), 386; *Mercer Co. v. Hackett*, 1 Wall. (68 U. S.) 83; *Gelpeke v. Dubuque*, 1 Wall. (68 U. S.) 175; *Meyer v. Muscatine*, 1 Wall. (68 U. S.) 384; *Lexington v. Butler*, 14 Wall. (81 U. S.) 282; *Grand Chute v. Winegar*, 15 Wall. (82 U. S.) 355; *St. Joseph v. Rogers*, 16 Wall. (83 U. S.) 644.

⁴ *Gelpeke v. Dubuque*, 1 Wall. (68 U. S.) 203; citing, *Commissioners v. Aspinwall*, 21 How. (62 U. S.) 539; *Royal, etc., Bank v. Furquaud*, 6 Ellis & Bl. 327 Farmers, etc., *Co. v. Curtis*, 7 N. Y. 466; *Stoney v. A. L. L Co.*, 11 Paige, 635; *Morris, etc., Co. v. Fisher*, 1 Stockton Ch. 667; *Wilmarth v. Crawford*, 10 Wend. 343; *Alleghany City v. McClurkan*, 14 Penn. St. 83; *Lexington v. Butler*, 14 Wall. (81 U. S.) 296.

⁵ *Mercer Co v. Hackett*, 1 Wall. (U. S.) 93.

It would seem to follow from these two propositions, that a purchaser of municipal bonds issued by the proper officers of a corporation, which by law, is authorized to issue them, is entitled to recover if the bonds recite that they are issued pursuant to law, without proving that they were so issued, and in compliance with the conditions and limitations imposed by law on the transaction.¹ If he is not required to look beyond the recitals of the bonds when he purchases them, he cannot reasonably be bound to prove upon the trial, the truth of the recitals upon the faith of which the law authorized him to make the purchase.

§ 108. Further rulings on this subject. — In a later case, however, these rulings are somewhat modified. Mr. Chief Justice Waite says: “To be a *bona fide* holder, one must be himself a purchaser for value without notice, or the successor of one who was. Every man is chargeable with notice of that which the law requires him to know, and of that which, after being put upon inquiry, he might have ascertained by the exercise of reasonable diligence. Every dealer in municipal bonds, which upon their face refer to the statute under which they were issued, is bound to take notice of the statute and all its requirements.” The mere recital of the statute in the bond will not suffice, the purchaser must, under this ruling, go to the statute itself and see that it is correctly recited; and, presumably, he must as well go to the organic law, the constitution of the state, and see whether the statute accords with that instrument, or whether the grant of power to issue the bonds in question is inhibited by the constitution. And if the dealer buys only coupons which refer to the bonds from which they have been detached, he is charged with notice of all that the bonds recite, and of the provisions of the statute to which they refer.²

¹ *Miller v. Berlin*, 13 Blatchfd. C. C. 245, 249.

² *McClure v. Oxford*, 4 Otto (94 U. S.), 429, 433.

§ 109. **What law enters into the contract of negotiable municipal bonds — Constitutional question.** — It sometimes happens that the negotiable bonds of municipal corporations are in the hands of innocent holders for value, when the laws by virtue of which they were issued are declared unconstitutional by the highest court of the state. Thus the question is presented whether an *ex post facto* adjudication of this character operates to avoid these bonds so in the hands of innocent holders, or whether the law controlling their validity is the law in force at the time of their issuance, as interpreted up to that time by the courts of the state. This question came up in the supreme court of the United States in a Missouri case in which it was held that “where municipal bonds have been put on the market as commercial paper, the rights of the parties thereto are to be determined according to the statutes of the state as they were then construed by her highest courts; and in a case involving those rights, this court will not be controlled by any subsequent decision in conflict with that under which they accrued.”¹

The rule on the relation of the federal judiciary to the statute laws of the several states is well expressed by Mr. Chief Justice Taney: “Undoubtedly this court will always feel itself bound to respect the decisions of the state courts, and from the time they are made, regard them as conclusive in all cases upon the construction of their own laws. But we ought not to give them a retroactive effect, and allow them to render invalid contracts entered into with citizens of other states which, in the judgment of this court were lawfully made.”²

¹ Douglass *v.* Pike County, 11 Otto (101 U. S.), 677, 686; citing and quoting, Rowan *v.* Runnels, 5 How. (46 U. S.) 134; Ohio, etc., Co. *v.* Debolt, 16 How. (57 U. S.) 416; Supervisors *v.* United States, 18 Wall. (85 U. S.) 71; Fairfield *v.* Gallatin County, 10 Otto (100 U. S.), 47.

² Rowan *v.* Runnels, 5 How. (46 U. S.) 134.

§ 110. Holders of negotiable municipal bonds must risk the authenticity of their bonds. — Purchasers of municipal securities must always take the risk of the genuineness of the official signatures of those who execute the paper that they buy. This includes not only the genuineness of the signature itself, but the official character of him who makes it. Hence, when a set of negotiable bonds were antedated (March 28), actually issued in October following, and signed by a person as presiding justice who had only attained that office in October, the holder otherwise innocent and ignorant, was charged with the knowledge that the presiding justice was not presiding justice at the date of the bonds, that they were therefore executed and issued after that date and after the enactment of a law (March 30), which required bonds issued after that date to be registered, and that they were not registered because no certificate to that effect was indorsed upon them as the statute required.¹

§ 111. Bona fide holders of county bonds not charged with notice of financial condition of county. — The holders of county bonds duly authenticated and issued by the county, and acquired in due course of trade, are not charged with notice of the financial condition of the county, nor required to know, or inquire whether the bonds in question were issued *ultra vires* of the county, being in excess of the constitutional limit of its indebtedness. Where the constitution of the state limited the power of the counties to contract indebtedness to five per cent of the assessed value of taxable property in the county, and a county nevertheless, issued warrants in excess of that amount, and subsequently, replaced those warrants with negotiable bonds, those bonds, when in the hands of innocent purchasers, were held to be good against the

county, although the debt which they represented had been unconstitutionally contracted.¹

§ 112. Duty of holder of bonds to see that the power to issue them existed — Absence of power distinguished from defective exercises of power. — With all the privileges of a *bona fide* holder of county bonds he is, nevertheless, bound to see that the county had, under the constitution and laws of the state, the power to issue bonds at all. It is not incumbent upon him, as already stated, to examine the county records, see how much is the assessed value of taxable property in the county, and how much debt the authorities have contracted on the faith of it; if the officers have the power to issue bonds at all, he may safely presume that they have done their duty, and kept within the prescribed limits. It is otherwise, if no power at all to issue the bonds exists in the county officers, or those of a township, because no election has been held as required by law. In such a case the bonds are simply void. And the fact that the town is authorized to donate money to a railroad company, and to levy a tax to raise it, does not in the slightest degree amend the matter, for the power to donate money, or levy a tax, is not equivalent to the power to issue negotiable bonds and does not include the latter power.

The rule is that when there is an entire absence of power as distinguished from a defective execution of a power, then the recital of those invested with the ministerial duty of issuing municipal bonds, will afford no protection to even *bona fide* holders, for value, of such bonds.²

§ 113. The source of power to issue municipal bonds — By whom such bonds must be issued. — In this connection it must always be borne in mind that a municipality

¹ S. C., etc., Co. v. Osceola County, 52 Iowa, 26; citing S. C. etc Co. v. Osceola Co. 45 Iowa, 168.

² Lippencott v. Town of Pana, 92 Ill. 24; Force v. Batavia, 61 Ill. 100; Williams v. Town of Roberts, 88 Ill. 13.

can only exercise the powers conferred upon it, by the charter of its organization, and such powers must either accrue from the terms of the express grant, or by reasonable implication as necessary to the due exercise of the privileges conferred. It follows from this principle, that whatever power has been expressly granted, or may be derived by reasonable implication from such grant, must be substantially pursued. If there is such a deviation from the prescribed course, that bonds issued under the power are absolutely void, not even the innocent holder, without notice, can be protected. No person, as a general rule, can acquire rights under a void instrument. Such is the case with forged paper, and paper issued without authority. Thus, when bonds were issued by "supervisors" and the law which was cited in the bonds themselves, only authorized their issuance by the county court, the incompetency of the supervisors was manifest, and the bonds and the law constituted, notice to all the world, that the acts of the supervisors were without warrant, and the bonds void. As already stated, it is incumbent upon persons dealing with corporations and agents, and especially those endowed only with special and limited powers, to verify the authority and pretensions of such corporations and agents, and if he neglects to do so, it is at his peril.¹

§ 114. General power to issue bonds — Recitals necessary. — It is generally the rule that the negotiable bonds of a county or like municipal corporation must, upon their face, refer to the statute by which their issuance is authorized. This recital is usually made, because the power of the officers to issue them is dependent upon the performance of a condition, and of that fact the officers are constituted the judges. If, however, the bonds recite merely that they are issued pursuant to a vote of the people of the county, they are presumptively valid (in Iowa), as

¹ Gaddis v. Richland County, 92 Ill. 119, 124.

in that state counties are endowed with the power to issue such bonds for public purposes, when their issuance is authorized by a popular vote. In that state, therefore, the specific occasion for using the credit of the county need not be set forth in the bond.¹

§ 115. Holder of bonds charged with notice of limitation of powers — Rule of construction. — It is very generally the case that municipal corporations are restricted by their charters or other organic law, in the use of their credit, to certain specific and definite purposes, as to the erection of public buildings and similar structures, for the use and benefit of the corporation, or of the people of the city, county, or town, as the case may be. Therefore, any issuance of bonds for purposes other than those enumerated in the charter or enabling act, or fairly to be implied from the terms of the charter or act, is invalid, unless specially authorized by the legislative power of the state. Hence, it has been held that a city, authorized by its charter to borrow money and issue bonds therefor, to provide for the paving of streets, construction of a city hall, "markets, and other structures of public necessity and utility," was not thereby empowered to issue bonds to purchase land for a railroad depot, and shops to be used by a railroad company. The words, "other structures of public necessity and utility," cannot be held to include such works as the depot and shops, because the well established rule of construction is that, "when particular words are followed by general ones, as it often happens, after an enumeration of several classes of persons or things, there is added, 'and all others,' the general words are restricted in meaning to objects of like kind with those specified."²

¹ Carpenter *v.* Buena Vista Co., 5 Dill. C. C. 556.

² Lewis *v.* Shreveport, 3 Woods C. C. 205, 210; citing, Chisholm *v.* Montgomery, 2 Woods C. C. 594; Mayor *v.* Ray, 19 Wall. (86 U. S.) 468; Knapp *v.* Mayor, etc., 34 N. J. L. 394.

§ 116. Summary of the characteristics of negotiable bonds. — It is not consistent with the purpose of this work to pursue this investigation further. It is manifest that *valid* negotiable bonds stand for all practical purposes upon precisely the same footing as ordinary commercial paper. The chief questions which have been adjudicated in this connection have been upon the *validity* of the bonds, not their negotiability, whether the powers vouchsafed by the law to the corporation or municipality which issued them were duly exercised or were exceeded, and whether the ministerial agents, through whose instrumentality the bonds were put upon the market, discharged their duty or disregarded it.

This chapter may be appropriately closed by repeating the leading principles of law controlling the immunities of *bona fide* holders of negotiable bonds and their exceptions.

As a general rule, a *bona fide* holder of commercial paper is not bound to make a critical examination of the title to such paper; his rights are not impaired by negligence, unmixed with fraud or bad faith.¹ If, however, he deals with a corporation for its negotiable bonds, or deals in such bonds at second or third hand, he must take notice of the organic law of that corporation, and its powers under it. If he deals with an agent of the government, or of a corporation, he is charged with a knowledge of the authority of such agent.² He has a right to presume when a corporation is vested with a power to issue negotiable bonds, that such power has been duly exercised by its accredited agents, and if upon their face they import a compliance with the law, he is not bound to look further.³ He is, however, charged with knowledge, as well of the statute

¹ *Welch v. Sage*, 47 N. Y. 143; *s. c.*, 7 Am. Rep. 423; *Seybell v. National, etc., Bank*, 54 N. Y. 488.

² See cases cited under § 106, *ante*.

³ See cases cited under § 107, *ante*.

to which the bonds refer, as to the recitals of the bonds themselves.¹ He is bound only by the law as it stood when the bonds were issued, and not by *ex post facto* adjudications.² He must risk the authenticity of the bonds, their due execution by accredited officers.³ He is not charged with notice of collateral matters, such as the financial condition of the county.⁴ He must, however, at his peril see that the bonds are issued under a valid power.⁵ In short, he must verify the powers and pretensions of the corporation in whose securities he deals, and the authority of all agents who profess to represent it, and if he fails to do this, and loss or injury results, he can blame nobody but himself.

¹ See cases cited under § 108, *ante*.

² See cases cited under § 109, *ante*.

³ See § 110, *ante*, and cases cited.

⁴ See § 111, *ante*, and cases cited.

⁵ See § 112, *ante*, and cases cited.

CHAPTER IV

BONDS UPON CONDITION GENERALLY — PENALTY — CONDITION.

SECTION 125. Bonds with penalty and condition.

126. What is a penalty?

127. Penalty unaffected by partial performance of condition.

128. Distinction between penalties of money bonds, and bonds for performance of covenants.

129. The condition of a bond.

130. The same subject continued.

131. Construction of bonds and conditions.

132. Effect of recitals in construing bonds.

133. Same subject continued.

134. Construction of bonds — Surplusage.

135. Another rule for the construction of bonds.

136. Construction of bonds — References to other documents.

137. Construction of bonds — Rule as to joint bonds.

138. Bonds payable after death.

139. Penalty and liquidated damages.

140. Same subject continued.

141. How far the intention of the parties can control the question whether the sum stipulated as a penalty or liquidated damages.

142. Rule when bond is partly legal and partly illegal.

§ 125. **Bonds with penalty and condition.** — As bonds which stipulate for the payment of money absolutely, without condition or contingency, are at this day relegated to the category of negotiable paper, and have become subject to the multitudinous provisions of commercial law, it is manifestly proper in a work of this character to pretermit any further consideration of them. Turning, therefore, to the class of instruments which still preserve most of the common-law characteristics of bonds, to wit, bonds with penalty and upon condition, the first question which presents itself is: what is a penalty; and the second, what is a condition?

§ 126. What is a penalty? — A penalty is that sum of money which the obligor in a bond binds himself, and agrees to pay in case of a breach of the condition attached to and made part of the obligation. Originally, upon breach of the condition, the liability for the entire amount of the stipulated penalty became absolute, and the imprudent or unfortunate obligor might be compelled to pay the whole amount of the penalty, although the damage or loss from the breach of the condition was comparatively insignificant.¹ Relief against this injustice was afforded, first, by appeal to a court of equity, and afterwards courts of law, following the example of the court of chancery, relieved against the penalty of a bond upon condition so far, that the principal of the debt on demand, with interest and costs, should be paid into court.² By statute of 4 and 5 Ann, chapter 16, this practice received the sanction of parliament. In more modern times, the rule was still further relaxed, so that at present, the judgment is for the penalty, but to be discharged upon the payment of the debt and damages as assessed by the jury, and the costs of the suit.

The practical effect of these changes in the law is, that the penalty of a bond never operates as a forfeiture, but merely fixes the maximum of the liability of the obligor. The question, when the penalty is to be regarded as a statement of agreed, ascertained, or liquidated damages, will be considered in a subsequent section.

§ 127. Penalty unaffected by partial performance of condition. — The penalty of a bond remains unaltered, although there may have been a partial performance of the condition, as for example, where the penalty of a bond was for one thousand dollars, and the condition was, that

¹ 2 Blacks. Com. 341.

² Burridge v. Fortescue, 6 Mod. 60; Ireland's Case, 6 Mod. 101; Butler v. Rolfe, 6 Mod. 25.

the obligor should pay the obligee one hundred dollars annually for life. After there had been ten annual payments of one hundred dollars each punctually made, suit was brought on the bond, and the court held that the penalty was still valid, and the plaintiff entitled to a judgment.¹

§ 128. Distinction between penalties of money bonds, and bonds for performance of covenants. — There is a very material distinction which should always be borne in mind, between bonds given to secure the performance of covenants, properly so called, and bonds for the payment of money. In the latter class of cases, whenever the performance of the condition would be simply the payment of a sum certain, by the obligor to the obligee, the rule is that if the amount due to the obligee by reason of the breach of the condition, together with the interest thereon exceeds the penalty of the bond the judgment will be for the full amount of the debt, interest and costs.² And this rule has been enforced even against a surety.³ In the former class of cases, where bonds are given for the performance of covenants, and the breach does not imply the payment of a sum certain, and damages do not follow as a mathematical sequence, as in case of interest, it is safe to follow the *dictum* of De Grey, chief justice: “The bond ascertains the damage by consent of parties. If, therefore, the defendant pays the plaintiff the whole stated damages, what can he desire more?”⁴

¹ Blackman *v.* Blackman, 5 Vt. 355.

² Lyon *v.* Clark, 8 N. Y. 148; Smedes *v.* Hooghtaling, 3 Caines, 48; 2 Am. Dec. 250; Petts *v.* Tilden, 2 Mass. 118; Mower *v.* Kipp, 6 Paige, 93; 29 Am. Dec. 748; Harris *v.* Clapp, 1 Mass. 308; 2 Am. Dec. 27; State *v.* Wayman, 2 Gill & J. 254; Tenant *v.* Gray, 5 Munf. (Va.) 494.

³ Harris *v.* Clapp, 1 Mass. 308. See, also, Mower *v.* Kipp, 6 Paige, 93; Clark *v.* Ld. Abingdon, 17 Ves. 106; Kirman *v.* Blake, 4 Bro. Parl. Cas. 532.

⁴ Brangwin *v.* Perrot, 2 W. Blackst. 1190; Shutt *v.* Proctor, 2 Marsh. 226; Wilde *v.* Clarkson, 6 Term. 302; McClure *v.* Dunkin, 1 East, 435; Hefford *v.* Alger, 1 Taunt. 218; Clark *v.* Bush, 3 Cowen, 151.

§ 129. **The condition of a bond.** — The condition of a bond is the statement with necessary and appropriate recitals of the circumstances and contingencies under and upon which the bond shall become void. The statement is necessarily in the alternative. In one case or contingency, the obligation is to become null and void, and the obligor's liability will be at an end; in the other his responsibility will become absolute and the condition is in such case said to be broken, and it is from a breach of the condition that nearly or quite all the litigation on this subject arises.

A bond with condition attached may, at common law, be either absolute or contingent or void by reason of the character of the consideration and terms of the condition. Blackstone says: "If the condition of a bond be impossible at the time of making it, or be to do a thing contrary to some rule of law that is merely positive, or be uncertain and insensible, the condition alone is void, and the bond shall stand single and unconditional; for it is the folly of an obligor to enter into such an obligation, from which he can never be released. If it be to do a thing that is *malum in se*, the obligation itself is void: for the whole is an unlawful contract, and the obligee shall take no advantage from such a transaction. And if the condition be possible at the time of making it, and afterwards becomes impossible by the act of God, the act of the law, or the act of the obligee himself, there the penalty is saved; for no prudence or foresight could guard against such a contingency."¹

§ 130. **Same subject continued.** — It is believed (under deep submission), that the distinction taken in the foregoing quotation between an act in violation of positive law

¹ 2 Blackst. Comm. 340, 341; Coke Litt. 206. See, on this subject generally, Taylor v. Mason, 9 Wheat. (22 U. S.) 345; Mitchell v. Reynolds, 1 Peere Wms. 181; Page v. Trufant, 2 Mass. 159; 3 Am. Dec. 41; Trustees v. Galatin, 4 Cowan, 340; Davidson v. Givens, 2 Bibb, 200; Lewis v. Knox, 2 Bibb, 453; Tuxbury v. Miller, 19 Johns. 311; Waite v. Harper, 2 Johns. 386; Bruce v. Lee, 4 Johns. 410; Mitchell v. Vance, 5 Monroe, 529; 17 Am. Dec. 96.

only, and an act *malum in se*, is without sufficient warrant in law. The bond, consideration, and condition, form one contract, and if the obligation assumed by either party to it is either to do an act *malum in se* or *malum prohibitum*, or otherwise against the policy of the law, the contract is illegal and void. Thus a contract in restraint of trade generally is illegal, not, however, *malum in se*, and the authorities are abundant that such a contract cannot be enforced.¹ So a contract that for a valuable consideration, a creditor should withdraw his opposition to the discharge of his debtor under the insolvent laws has been held illegal and void.² It is hardly *malum in se* for a creditor to forego his legal remedies as against his debtor, even if he is paid in part for his forbearance, yet such a course may, under circumstances, be against public policy as tending to mislead other creditors and facilitating a fraudulent escape by his debtors from legal liabilities. And it is believed to be quite immaterial whether the illegal contract is embodied in a mere written agreement, or the more formal and elaborate guise of a bond with condition, the effect is the same. The contract is illegal and courts of justice will not enforce illegal contracts.

§ 131. Construction of bonds and conditions. — In the construction of bonds and conditions, the rule of law is, that if the bond be a single one it shall be taken most strongly against the obligor; but if it has a condition annexed to it, which is doubtful, as that it is for the ease and favor of the obligor, it is to be taken most strongly in his favor. And in the construction of conditions, courts will look to the meaning of the parties, as far as it can be col-

¹ *Mitchell v. Reynolds*, 1 Peere Wms. 182, and cases cited.

² *Tuxbury v. Miller*, 19 Johns. 311; *Waite v. Harper*, 2 Johns. 386; *Bruce v. Lee*, 4 Johns. 410; *Rogers v. Kingston*, 2 Bingh. 441; *Constantine v. Blache*, 1 Cox's Cases, 287; *Jackson v. Davison*, 4 Barn. & Ald. 691; *Jackman v. Mitchell*, 13 Ves. jr. 581; *Wiggin v. Bush*, 12 Johns. 306; 7 Am. Dec. 324.

lected from the instrument itself; and when the intention is manifest, will transpose or reject insensible words, and supply accidental omissions, so as to give full effect to the intention of the parties. Thus, where, in a bond, reciting among other things, various sums of money in pounds, shillings, and pence, the word "pounds" was omitted at the most critical point, and the obligatory part of the instrument bound the obligor to pay simply "7,700," without more, the court held that it was competent to supply the word "pounds," as that was manifestly the meaning of the parties, and the obligation was incomplete and unmeaning without it.¹

§ 132. Effect of recitals in construing bonds. — And when the condition of a bond is preceded by a recital of explanatory facts, if a certain particular thing be referred to, the recital of that fact will be taken as a conclusive admission of it, and will be held to restrain the operation of the terms of the condition, although they may imply a larger liability than the words of the recital indicate. Lord Ellenborough lays it down as a rule that the general words of a clause must be restrained by the particular recital. "Common sense," he says, "requires that it should be so; and in order to construe any instrument truly, you must have regard to all its parts, and most especially to the particular words of it."² It follows, therefore, that the meaning of the parties, as gathered from the instrument itself, is the governing rule in the construction of obligations, and that in those accompanied with a condition, where the meaning is doubtful, such a construction must be put upon them as is most favorable to the obligors.³

¹ *Coles v. Hulme*, 8 Barn. & Cr. 568.

² *Payler v. Homesham*, 4 Maule & S. 425; *Pearsall v. Summersett*, 4 *Taunt*. 523.

³ *Bennehan v. Webb*, 6 Ired. (N. C.) 57.

§ 133. **Same subject continued.** — And where a distinct statement of a fact is made in the recital of a bond, it is not competent for the party bound to deny the recital, in an action upon the instrument and between the parties to it. But the same rule does not apply when the action is not founded upon the instrument, is wholly collateral to it, and brought by another party; then it is competent for the obligor to dispute the facts so admitted, and he can introduce proof to show that the admission was inconsiderately and improvidently made, and that it is not entitled to weight as a proof of the fact it is used to establish.¹

§ 134. **Construction of bonds — Surplusage.** — In carrying out the rule that all written instruments shall be so construed, *ut res magis valeat quam pereat*, courts will reject useless and unmeaning words, and give full effect to the paper, provided the words which remain are sufficient to make it sensible. Thus, where the bond of a guardian declared the obligors to be held and firmly bound to the governor of the state, but the words, "justices of the court of pleas and quarter sessions for the county of Orange," were interpolated after the official description of the governor, and the penalty was stated to be payable "to the said justices, or the survivors of them," etc., the court held that the words, "justices of the court," etc.; "to be paid to the said justices," etc., were useless and unmeaning, and as *utile per inutile non vitiatur*, those words were rejected, leaving a clear obligation to pay the governor the penalty of the bond.²

And not only will the court reject as surplusage irrelevant and unmeaning words in a bond, if enough remains to give it the necessary coherence and intelligibility, but it will regard as inserted in it words necessary to its purport, and

¹ Carpenter *v.* Buller, 8 Mees. & W. 209; Reed *v.* McCourt, 41 N. Y. 435.

² Iredell *v.* Barbee, 9 Ired. 250; Fitts *v.* Green, 3 Dev. 291; Vanhook *v.* Barnett, 4 Dev. 268.

obviously omitted by mistake. Thus, where the condition of a tax collector's bond was that he should pay taxes collected for the state and county into the treasuries of the state and —, "to which said treasuries shall be entitled respectively," the blank was held to mean "county," and was to be regarded as filled by it, the words "treasuries" and "respectively" being utterly unmeaning without it.¹

§ 135. Another rule for the construction of bonds.— As in construing other instruments the rule is in the construction of a bond that the *whole* language of the condition is to be taken into consideration. Thus, where a bond was given the object of which was to secure the payment of certain notes, drafts and acceptances, and although the language of the instrument seemed to limit its object to the payment of the bills, notes, etc., *thereafter* to be discounted, the court held the words "*so discounted*, or which may be so discounted," were sufficient in view of the whole tenor and manifest purpose of the instrument, to indicate that existing as well as future liabilities were provided for.²

§ 136. Construction of bonds—References to other documents.— It is not necessary in the condition of a bond that all the details of its subject-matter should be particularly and specifically rehearsed. It is sufficient if the instrument refers to another paper in which those details are fully set forth. Such a reference adopts that other paper, and makes it a part of the condition so far as it is pertinent and appropriate thereto. Thus, where the bond of an agent of fortifications was that he should perform the duties of that office, it was held sufficient, although it did not enumerate those duties, which were prescribed in the army regulations. Chief Justice Marshall said: "'That is certain which may be rendered certain ;' and an undertaking to per-

¹ De Soto v. Dickson, 31 Miss. 150.

² New Hampshire Bank v. Willard, 10 N. H. 210.

form the duties prescribed in a distinct contract or in a law, or any other known paper prescribing those duties, is equivalent to an enumeration of those duties in the body of the contract itself.”¹

Upon the same principle an indorsement made upon a bond at the time of its execution is to be regarded as a part of it, and must be duly considered in giving a construction to the obligation.² It is essential, however, that the indorsement be strictly simultaneous with the execution of the bond. A subsequent indorsement cannot be regarded as a part of the deed, for it is in law and in fact another and a different agreement. If it be sealed and delivered it becomes a new deed and entitled to be treated as such. If it is not sealed and delivered, it cannot be treated as a part of the original deed without imposing on the party an obligation which the law only authorizes when the solemnities of sealing and delivery are duly observed.³

§ 137. Construction of bonds and conditions continued — Rule as to joint bonds. — If a bond purporting to be a joint bond be signed by only one of the obligors recited in it, it is a valid bond as to him, and if without authority he has signed the name of the other party that fact will in no degree tend to avoid the bond, for the obligor cannot take advantage of his own wrong to escape the consequences of his own act.⁴

§ 138. Bonds payable after death. — A bond for the payment of money after the death of the obligor, is, in a proper case, a valid obligation *inter vivos*, is irrevocable

¹ United States *v.* Maurice, 2 Brock. C. C. 96, 114.

² Hughes *v.* Sanders, 3 Bibb, 360; Williams *v.* Handley, 3 Bibb, 10; Sherman *v.* Beale, 1 Wash. (Va.) 11; Nichols *v.* Douglass, 8 Mo. 49.

³ Williams *v.* Handley, 3 Bibb (Ky.), 10; Cook *v.* Remington, 6 Mod. 237; Nichols *v.* Douglass, 8 Mo. 49.

⁴ Wood *v.* Ogden, 16 N. J. L. 453; citing, Motteaux *v.* St. Aubin, 2 W. Blacks. 1133; Green *v.* Beals, 2 Caines, 254; Gerard *v.* Basse, 1 Dall. 119.

and cannot be regarded as in the category of testamentary dispositions. Thus, where a woman, in order to equalize the shares of her children in her estate, gave to each of those to whom she had made no advances, a note under seal for a suitable amount proportioned to the advances made to those who received no note, and stated in each of the instruments that, "this note, or the amount thereof, principal and interest, is not due or payable, until after my death," the court held that the notes were valid obligations. "A voluntary bond," the court said, "is both in equity and at law, a gift of the money." "A man may give a present bond to pay a sum of money at his death, and a delivery of it to the obligee renders it perfect as a present obligation, though payable at a subsequent, whether a fixed or uncertain, period, to be afterwards ascertained and made certain. It is strictly, *debitum in praesenti, solvendum in futuro*, and is as irrevocable as any other obligation under seal, which in law imports a consideration."¹

§ 139. Penalty and liquidated damages. — It is undoubtedly true, that the courts of this country habitually regard the sum stipulated in a bond of the ordinary form to be paid by the obligor, to the obligee as a penalty or security of the performance of the condition, and not as liquidated damages, or the amount to be absolutely paid upon its breach. The presumption that the sum named is intended as a penalty, as the maximum to which the obligee can become entitled, can only be controlled by very strong considerations. When an obligor has bound himself not to exercise a certain trade in a certain place under a penalty stated in the bond, the courts will be more inclined than in other cases to regard the sum named, not as the penalty but as agreed or stipulated damages for the breach of the condition. But if having it in their power to make it clear, that they

¹ Mack's Appeal, 68 Penn. St. 231: Sherk v. Endress, 3 Watts & S. 256; Yard v. Patten, 13 Penn. St. 285.

meant the sum stated to be liquidated damages, they omit to do so, the character of the transaction will not of itself suffice to induce the court to depart from the general rule, which is to regard such sums so stipulated, as mere securities for the performance of the condition.¹ The rule on this subject is thus stated by Chief Justice Marshall: “In general a sum of money in gross, to be paid for the non-performance of an agreement, is considered as a penalty, the legal operation of which is to cover the damages which the party in whose favor the stipulation is made may have sustained from the breach of contract by the opposite party. It will not, of course, be considered as liquidated damages; and it will be incumbent on the party who claims them as such to show that they were so considered by the contracting parties.”² And it has been said in a Massachusetts case that it must be *proved* that the stipulated sum was liquidated damages, for “it is not always the calling of a sum to be paid for the breach of a contract liquidated damages, which makes it so. In general it is the tendency and preference of the law to regard a sum stated to be payable if a contract is not fulfilled as a penalty and not as liquidated damages; because, it may then be proportioned to the loss actually sustained.”³

§ 140. The same subject continued. — The general rule on this subject is to some extent controlled by the question whether the contingency guarded against is single, comprising only a particular specified act in regard to which damages may arise in case of default, or whether the covenant be to perform several things, or else to pay the sum

¹ *Davis v. Gillett*, 52 N. H. 126; *Astley v. Weldon*, 2 Bos. & P. 346; *Street v. Rigley*, 6 Ves. jr. 815; *Price v. Green*, 16 Mees. & W. 346; *Davies v. Penton*, 6 Barn. & C. 216; *Higginson v. Weld*, 14 Gray, 165; *Smith v. Wainwright*, 24 Vt. 97; *Richards v. Edick*, 17 Barb. 260.

² *Tayloe v. Sandiford*, 7 Wheat. (20 U. S.) 18.

³ *Wallis v. Carpenter*, 13 Allen, 19, 25; *Shute v. Taylor*, 5 Met. 61; *Fisk v. Gray*, 11 Allen, 182.

specified. In the former case, it is said, that although the policy of the courts is, if possible, to view the sum agreed upon as a penalty, yet unless there are words evincing an intention that the sum reserved in case of a breach shall be viewed only as a penalty, such sum may be recovered as liquidated damages.¹ If, however, the contract be to perform several acts, or else to pay the sum specified, that sum, it is well settled, will always be considered by the courts as a penalty and not as liquidated damages.² And so rigid is this rule that, although the parties in so many words and in express terms stipulate that the sum inserted in the agreement shall be liquidated damages, and shall not be a penalty, the courts will nevertheless hold it to be a penalty, unless the agreement specify the particular stipulation or stipulations to which the liquidated damages are to be confined. Thus, there was a contract between a theatrical manager and an actor, by which the former agreed to pay the latter for his services £3, 6s, 8d. every night for a stated period, and that he should have a benefit each season on certain terms, the actor agreeing to be principal comedian in the company for four seasons. And it was agreed that if either party violated the agreement "or any part thereof, or any stipulation therein contained, such party should pay to the other the sum of £1,000, * * * to be liquidated and ascertained damages, and not a penalty or penal sum or in nature thereof." The actor broke his engagement, and the manager obtained a verdict for £750, subject to be increased to £1,000, if the court should be of opinion that that sum was legally stipulated in the agreement as liquidated damages. There was a rule *nisi* to that effect, which, after argument the court discharged, holding

¹ *Swift v. Crow*, 17 Ga. 609; *Leighton v. Wales*, 3 Mees. & W. 545. See, also, *Sainter v. Ferguson*, 7 Mann. Gr. & Se. 716.

² *Swift v. Crow*, 17 Ga. 609; *Astley v. Weldon*, 2 Bos. & P. 345; *Kemble v. Farren*, 6 Bing. 141; *Davies v. Parton*, 6 Barn. & Cr. 210; *Niver v. Rossman*, 18 Barb. 50; *Cotheal v. Talmage*, 9 N. Y. 551.

that the sum of £1,000 expressed in the agreement was a penalty and not liquidated damages.¹ This decision can hardly be justified, unless it be considered the province of courts of justice not to construe the contracts of parties, but to make contracts for them, and to protect all persons who make improvident bargains from the consequences of their folly and imprudence.

§ 141. How far the intention of the parties can control the question whether the sum stipulated is a penalty or liquidated damages. — In a very thoroughly considered case in Michigan it was said that it is the duty of courts to give just compensation for the loss or injury actually sustained by the plaintiff, and it is fully as unjust to give him less than he deserves, as to enable him to extort more. Consequently courts will not enforce a contract manifestly unjust, and in construing contracts in which the question of penalty or liquidated damages arises, regard must be had to the question whether or not the sum stipulated, regarded as liquidated damages is reasonable or extortionate. In the latter case courts will disregard the intention of the parties, and look only to the nature of the contract. If the sum stipulated is, under the circumstances, in the nature of a penalty, the court will so adjudge it, for it cannot do otherwise, except by going back to the old doctrine, long ago exploded, that upon the breach of the condition of a bond the plaintiff was entitled to the *whole* of the penalty, and giving him that penalty in the name of liquidated damages.

If, however, from the character of the transaction, the damages are uncertain in their nature, or difficult to be ascertained, and only the parties are really competent to compute them with accuracy, the law will permit them to do so, and fix the amount as liquidated damages. And in

¹ *Kemble v. Farren*, 6 Bing. 141.

permitting this, the principle of compensation still remains the law of the contract, and the court merely adopts the estimate of the damages made by the parties as the best and surest estimate that under the circumstances can be made at all. The fact that such was the intention of the parties must clearly appear from a full consideration of all the circumstances of the case and all the evidence before the court. The technical language used will not control the decision. If the parties really mean *liquidated damages*, the court will so hold in a case of this description, although in the instrument the words "penalty," "forfeit," "forfeiture," be freely used.¹

§ 142. Rule when bond is partly legal and partly illegal. — Where part of the condition of a bond was for a lawful purpose, the payment of money, and part for an

¹ *Jaquith v. Hudson*, 5 Mich. 123, 138; citing, *Sainter v. Ferguson*, 7 Mann. Gr. & S. 716; *Jones v. Green*, 3 Y. & Jer. 299; *Pierce v. Fuller*, 8 Mass. 223; 5 Am. Dec. 102; *Nobles v. Bates*, 7 Cow. 307; *Fletcher v. Dycke*, 2 Term, 32. When the penalty of a bond is a penalty and when it is merely a statement of liquidated damages is a question that has produced much litigation, and there have been many nice distinctions made in applying appropriate legal principles to the facts presented in the numerous adjudicated cases. For the purposes of this work, it is believed, the principles controlling the subject are sufficiently stated in the sections devoted to it. The reader who wishes to pursue the investigation further is referred to the following list of cases in which he will find the matter very fully discussed: *Atkins v. Kinnier*, 4 Exch. 776; *Davies v. Penton*, 6 Barn. & Cr. 216; *Boyce v. Ancell*, 5 Bing. (N. C.) 390; *Shiell v. McNitt*, 9 Paige Ch. 101, 106; *Heard v. Bowers*, 23 Pick, 455; *Lampman v. Cochran*, 16 N. Y. 275; *Jackson v. Baker*, 2 Edw'd Ch. 471; *Lynde v. Thomson*, 2 Allen, 456, 458; *Beckman v. Drake*, 8 Mees. & W. 846, 853; *Homer v. Flintoff*, 9 Mees. & W. 678; *Gower v. Saltmarsh*, 11 Mo. 271; *Reilly v. Jones*, 1 Bing. 302; *Lange v. Werk*, 2 Ohio St. 419, 534; *Esmond v. Van Benshoten*, 12 Barb. 366; *Beale v. Hayes*, 5 Sandf. (N. Y.) 640, 644; *Randal v. Everest*, 1 Moo. & M. 41; S. C. 1 Carr. & P. 577; *Penkerton v. Casslon*, 2 Barn. & Ald. 704; *Shute v. Taylor*, 5 Metcf. 61; *Cirhsdee v. Bolton*, 3 Carr. & P. 240; *Smith v. Coe*, 1 Jones & Spencer, 3 (38 N. Y. Sup. Ct.), 480; *Slosson v. Beadle*, 7 Johns. 72; *Pearson v. Williams*, 24 Wend. 240; *Gray v. Crosby*, 18 Johns. 219; *Upham v. Smith*, 7 Mass. 265; *Dwinel v. Brown*, 54 Me. 468; *Whitefield v. Levy*, 35 N. J. L. 149.

unlawful purpose, a simonaical contract, the bond was held good for the payment of money and void as to the simony. Lord Ellenborough said: "At common law you can separate the bad from the good."¹ Wherever, therefore, the subject-matter of a bond be divisible, and part is bad and part is good, the common law will give full effect to the latter and avoid the former. If, however, one part is good and another bad in matter of substance, and no separation is practicable, the bad contaminates the good and all is void:

¹ *Newman v. Newman*, 4 Maule & S. 70.

CHAPTER V.

BONDS UPON CONDITION — SPECIAL RELATIONS — INFANCY — COVERTURE — PARTNERSHIP.

- SECTION 150. Special relations and disabilities affecting obligors in bonds upon condition.
 - 151. Effect of enabling statutes on disabilities of coverture and infancy.
 - 152. Bond of feme covert and her sureties valid against the latter.
 - 153. Contracts of infants — Necessaries — Enlistment.
 - 154. Contracts of infants — Assignments under insolvent acts.
 - 155. Contracts of infants — Bastardy bond — Official bond.
 - 156. Infants — Bonds based upon privileged considerations valid.
 - 157. Official and other bonds which an infant may execute.
 - 158. At common law one partner could not bind another by any instrument under seal.
 - 159. Modifications of the rule as to bonds of partners by American decisions.
 - 160. The existing law as to bonds of partners and partnerships.
 - 161. Surety — For partnership on official bond — No liability for acts of surviving partner.

§ 150. Special relations and disabilities affecting obligors in bonds upon condition. — There are certain relations in which the obligors in official and other bonds upon condition may stand toward third persons by which the obligations of those bonds may be controlled, modified or abrogated. Of these the most notable are the disabilities of infancy and coverture, and the relation of partnership, and it is now proposed to inquire how far, and in what respect the legal construction and practical effect of such bonds can be controlled by these special relations.

The disability of infancy might seem to stand upon the same footing in this respect with that of coverture, as at

common-law both classes of persons were equally incapable of entering into general contracts charging their estates.

These disabilities have been diminished by legislation in many of the states but in unequal degrees, the powers of married women over their estates being greatly enlarged, while that of infants, or more properly their liability for their acts being but little changed.

On this subject generally, it may be said that all questions of minority or majority, incapacity growing out of coverture, emancipation, and other personal qualities and disabilities are governed by the law of the place where the contract is made or the act done.¹

§ 151. Effect of enabling statutes on disabilities of coverture and infancy. — If, therefore, by the statute law of any state, the disability of a *feme covert* or of an infant is in any degree diminished, so that his or her contracts are thereby to that extent validated, an official bond, executed by such person, is also to that extent, and within the statutory limits, as obligatory as any other contract. Thus, under the law of New York, a *feme covert* was permitted to carry on business on her own account, and for her own benefit, separate from the business of her husband. This being the general law of the state, it was held that under it she could carry on the business of a distiller, that she was necessarily endowed with all the powers, and subject to all the liabilities essential to the carrying on of that business, and that among other things, she could execute an official bond, required by act of Congress, to legalize her warehouse as a bonded warehouse. It may be here remarked that the principle on which the common law is enforced by the courts of the United States is not that the

¹ *Walkers v. Witters*, 1 Doug. 6; *Martin v. Nicolls*, 3 Simon, 44; 2 Kent Com. 455. See, also, *Thompson v. Ketchum*, 8 Johns. 190; 5 Am. Dec. 332; *Bank, etc., v. Earle*, 13 Pet. (38 U. S.) 520; *Townsend v. Jamison*, 9 How. (50 U. S.) 407, 414.

common law has been adopted by the United States, or has, under the laws of the United States, any binding force, except as being the law of some state, territory, or district. The courts of the United States enforce the common law, not as *common law*, but as the law of the state or jurisdiction in which the cause of action originated, and, of course, with all the modifications made by legislation in that state or jurisdiction. "When, therefore, a common-law right is asserted, we must look to the state in which the controversy originated."¹ And as a consequence of these legal principles, wherever a person otherwise under disability is relieved in part of that disability by the law of the state, the United States has power, within those limits, to contract with the person so relieved, and the contract may as well take the form of an official bond as any other form, provided it falls within the terms of the relieving or enabling statute.²

§ 152. Bond of feme covert and her sureties valid against the latter. — It is, however, undoubtedly true that in the absence of any enabling statute, the bond of a married woman is absolutely void as to her, but it does not follow that it is a nullity as to her sureties. "The general rule is that the extent of the liability of the surety is measured by that of the principal, but it is not of universal application, and exceptions to it may arise when the matter of defence, pleaded by the principal, is wholly of a personal character, as coverture or infancy. The coverture of the

¹ *United States v. Gurlinghouse*, 4 Benedict C. C. 194, 206; citing, *Wheaton v. Peters*, 8 Pet. (33 U. S.) 593, 638; *Kendall v. United States*, 12 Pet. (37 U. S.) 524; *Lorman v. Clarke*, 2 McLean, C. C. 568; *Pennsylvania v. Wheeling, etc., Co.*, 13 How. (54 U. S.) 564; *Cox v. United States*, 6 Pet. (31 U. S.) 172, 203.

² *United States v. Garlinghouse*, 4 Benedict C. C. 194, 199. See, also, *United States v. Howell*, 4 Wash. C. C. 620; *United States v. Tingey*, 5 Pet. (30 U. S.) 115; *United States v. Bradley*, 10 Pet. (35 U. S.) 343; *United States v. Linn*, 15 Pet. (40 U. S.) 290; *Tyler v. Hand*, 7 How. (48 U. S.) 573; *United States v. Maurice*, 2 Brock. C. C. 96.

principal at the time a note or bond is given, may be interposed as a bar to a recovery against her, but it alone cannot effect the discharge of the surety, the surety, in such case, standing, in a certain sense, as a principal promisor.”¹

§ 153. Contracts of infants — Necessaries — Enlistment. — The law governing the contracts of infants is not fully settled, but Mr. Justice Story, following Lord Chief Justice Eyre, lays down this rule, which commends itself equally to common sense, right, reason, and legal analogies. “Where the court can pronounce that the contract is for the benefit of the infant, as for necessaries, then it shall bind him; when it can pronounce it to be to his prejudice, it is void; and where it is of an uncertain nature, as to benefit or prejudice, it is voidable; and it is at the election of the infant to affirm it or not.”² It may be added, upon the same high authority, that the disabilities of an infant, are intended only for his own protection, and not for that of other persons; that the privilege of avoiding such of his acts and contracts as are voidable, is a personal privilege which no one can exercise for him; and that whenever any common law disability is removed by statute, the competency of the infant to do all acts within the purview of the statute, is as complete as that of a person of full age.

Upon these principles, it was held that a contract of enlistment in the army or navy of the United States, made by an infant, under an act of Congress, without fraud or circumvention on the part of the government agents, is

¹ Weed, etc., *Co. v. Maxwell*, 63 Mo. 486; *Smiley v. Head*. 2 Rich. (S. C.) 590; *Foxworth v. Bullock*, 44 Miss. 457; *Stillwell v. Bertrand*, 22 Ark. 375; *Davis v. Staats*, 48 Ind. 103. *Jones v. Crosthwaite*, 17 Iowa, 395; *Kimball v. Newell*, 7 Hill, 116.

² *United States v. Bainbridge*, 1 Mason, C. C. 71, 82; citing, *Keane v. Boycott*, 2 H. Blackst. 511. See, also, *The King v. Shinfield*, 14 East, 541; *Zouch v. Parsons*, 2 Burr, 1794; *Burgess v. Merrill*, 4 Taunt. 468.

neither void nor voidable, but strictly obligatory upon the infant, is for his benefit and for the public benefit.¹

§ 154. Contracts of infants — Assignments under insolvent acts. — And upon the principle that an infant is bound by contracts manifestly to his advantage, an infant imprisoned in execution, in a civil suit for assault and battery, may, to secure his liberty, make a valid assignment of his property, under the insolvent debtor's law, notwithstanding his nonage. It may be remarked, however, that, by the terms of the law, "every person" was entitled to its benefit.²

§ 155. Contracts of infants — Bastardy bond — Official bond. — Upon a different principle, an infant is bound upon a bastardy bond. The court says: "When an infant is under a legal obligation to do an act, he may bind himself by a fair and reasonable contract, made for the purpose of discharging the obligation. If this be not a general rule, it is, at the least, one of pretty wide application. * * * After an order of filiation, an infant is bound by law to support his illegitimate child (1 R. S. 642, § 2), and there can be no doubt but that his promise to pay for necessaries furnished to the child would be valid. The statute also obliges an infant to indemnify the city, town, or county, against the expenses of supporting his illegitimate child, and makes it necessary for him to enter into a bond with sureties, as the only means by which he can obtain a discharge from arrest, (1 R. S. 645, §§ 14, 15), and I think the statute has given him a legal capacity to make a binding obligation."³

A bastardy bond, it will be remembered, is only authorized by statute, and therefore must be classed among offi-

¹ United States *v.* Bainbridge, 1 Mason C. C. 71, 83.

² People *v.* Mullin, 25 Wend. 698.

³ People *v.* Moores, 4 Denio, 518; McCall *v.* Parker, 13 Metcf. (Mass.) 372; Garvin *v.* Boston, 8 Ind. 69.

cial bonds, and hence, wherever, under the laws of any state, an infant is subject to an order of filiation, and liable to the consequences of such an adjudication, the bond which he may execute under the requirements of the statute, is obligatory upon him. It may, in one sense, be said to be for his advantage, as its execution keeps him out of jail; but it is, perhaps, more properly a statutory removal *pro tanto* of the disability of infancy, the order of filiation operating *pro hac vice*, as a brevet of manhood.

§ 156. Infants — Bonds based upon privileged considerations valid. — It has been said by Chief Justice Parsons that infants are bound by all acts which they are obliged by law to do.¹ As an infant is bound to pay a judgment or debt contracted for necessaries, so he may make a valid promise to refund the money to any one who will satisfy the judgment or debt.² And he is equally bound to provide for the support of his wife and children, and he is answerable on his contract for necessaries furnished to them.³ It may fairly be concluded that any bond executed by an infant, based exclusively upon a privileged consideration of this character, whether it be a bond absolute or upon condition, would be enforced against him. And among other obligations, an infant may enter personally into a recognizance to answer a criminal charge, or become principal (but not surety), in a bail bond, to answer a like charge, and in either case, the obligation which he thereby assumes may be enforced against him and his sureties.⁴

§ 157. Official and other bonds which an infant may execute. — From the foregoing sketch of the law, relating to the contracts and liabilities of infants, it is manifest that

¹ Baker *v.* Lovett, 6 Mass. 80; 4 Am. Dec. 88.

² Clarke *v.* Leslie, 5 Esp. 28; Randall *v.* Sweet, 1 Denio, 460.

³ Turner *v.* Trisby, 1 Stra. 168.

⁴ State *v.* Weatherwax, 12 Kan. 463.

several varieties of conditional bonds, and even of official bonds, may be enforced against such precocious obligors. When an infant has prematurely "given hostages to fortune," in the shape of a wife and children, it may well happen that the liabilities of the juvenile *pater familias* may assume the shape of writings, obligatory, absolute, or conditional. Rashness of a far more reprehensible character, culminating in a filiation order, may result in a strictly official bastardy bond. Besides these, infants may become parties to official bonds of a creditable character. If a bright boy of eighteen or nineteen years of age is appointed teller or book-keeper of a bank, there is no reason why his bond is not fully obligatory on him as well as his sureties, for the contract which it embodies is manifestly to his advantage, securing a good salary, a respectable position, and fair prospects of indefinite promotion, upon the easy and reasonable condition of a faithful discharge of duty. It has already been said that when a contract, made by an infant, is manifestly for his benefit, the court will enforce it.¹ So, also, it may chance that an infant, improvidently appointed or elected to office, may become a *de facto* officer, and his bond, in such case, will bind his sureties as well as himself. The former would assuredly be bound, upon principles already stated, and even if the bond should be held voidable, it would require a prompt disa-

¹ *United States v. Bainbridge*, 1 Mason C. C. 82; citing, *Ex parte Hopkins*, 3 P. Wms. 151; *Rex v. DeMannville*, 5 East, 222; *DeMannville v. DeMannville*, 10 Ves. jr. 52; *Archer's Case*, 1 Ld. Rayd. 673; *Rex v. Smith*, 2 Str. 982; *Rex v. Delaval*, 3 Burr. 14 (1484); *Commonwealth v. Addicks*, 5 Benn. 520; *Day v. Everet*, 7 Mass. 145; *Respublica v. Kepple*, 2 Dall. 197; *The King v. Crawford*, 8 East, 25; *Grace v. Wilber*, 10 Johns. 453; *s. c.*, 12 Johns. 68; *The King v. Reynolds*, 6 Term. 447; *The King v. Edwards*, 7 Term. 238; *Ex parte Softly*, 1 East, 466; *Ex parte Broke*, 6 East, 238; *Zouch v. Parsons*, 3 Burr. 1794; *Burgess v. Merrill*, 4 Taunt. 468; *Keane v. Boycott*, 2 H. Blkst.; *The King v. Shenfield*, 14 East, 541; *Day v. Everett*, 7 Mass. 145; *Ex parte M'Dowle*, 3 Johns. 328; *Commonwealth v. Murray*, 4 Binn. 487; *Ferguson's Case*, 9 Johns. 239; *Martin v. Hunter*, 1 Wheat. (14 U. S.) 239; *Commonwealth v. Cushing*, 11 Mass. 67; *Gray v. Cookson*, 16 East, 13.

vowal of it, and abandonment of the office, after attaining his majority, to enable the infant to vacate his bond.

§ 158. At common law one partner could not bind another by any instrument under seal.—It is a general rule of the common law that one partner cannot bind another by deed, or any obligation or instrument under seal. And this is the law, although the obligation be contracted in the course of the partnership business and within its scope.¹ An exception, however, may be admitted when the authority to execute the sealed instrument has been given under the seals of the other partners, but it must include the very act in question. Although the articles of partnership may themselves be under seal, that fact does not authorize any member of the firm to bind his co-partners by any writing under seal. It is necessary that a particular power be given for that purpose in the articles.² If, however, a partner has such a particular power executed under seal by his co-partners, he may bind them by deed in a transaction in which they are all interested. And if all the partners are present, a parol authority given to one by the others will suffice to empower him to execute a deed which will charge them. And if the partners, not having been present, subsequently adopt and ratify the deed they will be bound by it.³

§ 159. Modifications of the rule as to the bonds of partners by American decisions.—This is in substance the common law and the English law on this subject, but in many of the American states it has been greatly modified

¹ *Snyder v. May*, 19 Penn. St. 235; *Henry County v. Gates*, 26 Mo. 315; *Remington v. Cummings*, 5 Wis. 138; *Cummings v. Parrish*, 39 Miss. 412. See, also, *Hoskinson v. Eliot*, 62 Penn. St. 393; *McNaughton v. Partridge*, 11 Ohio, 223; 38 Am. Dec. 741.

² *Harrison v. Jackson*, 7 Term, 207, 210.

³ *Ball v. Dunsterville*, 4 Term 318; *Williams v. Walsby*, 4 Esp. 220; *Brul-ton v. Burton*, 1 Chitty, 707; *Swan v. Stedman*, 4 Metc. (Mass.) 548.

to meet the requirements of commercial pursuits. Thus, a ratification of the deed or bond by partners who do not execute it, may be made by parol. And in the same manner authority to execute such a deed may be given.¹ It is almost superfluous to say, and yet it has been decided that the previous authority of the partners or their subsequent ratification of the act, must be established by proof.² In Delaware, authority cannot be proved by parol.³ And in Tennessee there were similar rulings in the older cases,⁴ but subsequent decisions are more in accord with the general line of American authorities.⁵

§ 160. The existing law as to bonds of partners and partnerships. — It only remains, therefore, to say that notwithstanding the rigor of the old law on the subject, a partnership may, at this day, become the obligor in an official or other bond upon condition, in a case requiring the execution of such an instrument, provided that the partner who executes it is previously authorized to do so by the partners who do not execute it, or else that his act in so charging the firm and his associates, is afterwards duly ratified and confirmed by them, and provided, also, that due and sufficient proof be made of such authority or ratification.

¹ *Swan v. Stedman*, 4 Metc. (Mass.) 548; *Johns v. Batlin*, 30 Penn. St. 84; *Smith v. Kerr*, 3 N. Y. 144; *Gwinn v. Rooker*, 24 Mo. 291; *Ely v. Hair*, 16 B. Monr. 230; *Crady v. Shepherd*, 11 Pick. 400; *Skinner v. Dayton*, 19 Johns. 513; 5 Am. Dec. 286; *Gram v. Seton*, 1 Hall, 262; *Bond v. Aitkin*, 6 Watts & S. 165; 40 Am. Dec. 550; *McDonald v. Eggleston*, 26 Vt. 154; *Dreewright v. Philpott*, 16 Ga. 424; *Russell v. Annable*, 109 Mass. 72; *Holbrook v. Chamberlin*, 116 Mass. 155; *Gunter v. Williams*, 40 Ala. 561; *Gibson v. Warden*, 14 Wall. (81 U. S.) 244. See, also, *Cunningham v. Lamar*, 51 Ga. 574; *Mann v. Aetna, etc., Co.*, 40 Wis. 549; *Kasson v. Brocker*, 47 Wis. 79; *Williams v. Gillies*, 75 N. Y. 197; *Hawkins v. Nat. Bank*, 1 Dill. (C. C.) 462.

² *Dillon v. Brown*, 11 Gray, 179; *Butterfield v. Helmsley*, 12 Gray, 226; *Fox v. Norton*, 9 Mich. 209.

³ *Little v. Hazard*, 5 Harr. 291.

⁴ *Turbeville v. Ryan*, 1 Humph. 113; *Napier v. Catron*, 2 Humph. 534.

⁵ *Lambden v. Sharp*, 9 Humph. 224; 34 Am. Dec. 642.

§ 161. Surety—For partnership on official bond — No liability for acts of surviving partner. — A surety on the official bond of a firm of insurance agents is not liable for the acts of the surviving partner who continues the business. The partnership is of course dissolved by the death of one of its members, and the liability of the surety ceases as soon as his principal, the partnership, goes out of existence.¹

¹ Connecticut, etc., Co. v. Bowler, 1 Holmes C. C. 263, 266; s. c., 4 Myers' Fed. Dec., § 645.

CHAPTER VI.

BOND UPON CONDITIONS—CONSTRUCTION OF CONDITION—
IMPOSSIBLE, ILLEGAL, INSENSIBLE, AND VOID CONDITIONS.

SECTION 165. What is an official bond?

166. Execution of official bond — Delivery by surety upon condition.
167. Execution of bond — Obligors bound although their names are not recited.
168. Official bonds executed in blank — When obligatory on the surety.
169. Execution of official bond — To whom it should be made payable.
170. Official bond must be payable to the proper obligee.
171. Form and essentials of official bonds.
172. Form of official bonds — Rules on that subject.
173. Terms of official bonds — What is essential and what superfluous.
174. Approval of bond — Whether acceptance or not.
175. Approval of bond — Defect in, when unavailable for surety as matter of defense.
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200. Same subject continued.
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224. Same subject continued.
225. Liability of sureties when principal holds office “until his successor is elected,” etc.
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§ 165. What is an official bond?— What is essential to render an obligation an official bond has been set forth at sufficient length in a preceding chapter. It is well, however, to repeat here that any and every bond which by statute is required to be executed by an officer is an official bond and must be regarded as such in the construction of any statute relating to such bond. Thus, in Kentucky, the sheriff was required to execute three bonds, one conditioned generally for the discharge of his duties, and designed chiefly to secure the interest of individuals; another for the benefit of the state; and a third for the security of the county. In another connection it was made the duty of the county court to require the sheriff to give other sureties if upon investigation it should find his “official bond” insufficient. The court held that this power extended to each of the three several bonds of the sheriff, that each of them was, in the sense of the statute, and in every other proper sense, his official bond, and that the power and duty of the county court in the matter of further security, extended as well to one as to another of the bonds.¹

§ 166. Execution of official bond — Delivery by surety upon condition. — It is well settled law that a bond which is a complete and perfect instrument upon its face at the

¹ Commonwealth v. Adams, 3 Bush (Ky.), 41, 46.

time of its delivery by the principal obligor to the obligee, is binding upon all who have signed it, although one or more of the sureties may have executed and delivered it to the principal obligor, upon condition, that before it should be delivered to the obligee another person or other persons were to sign it. It is valid although it shall not be signed by those other persons unless indeed the obligee before he received it was aware of the condition upon which it was signed. When one of two innocent persons must suffer a loss by reason of the act of a third person, that loss must fall upon the one who enabled that third person to cause it. And sureties who entrust their principal with a bond signed by them for delivery to the obligee, make him their agent and are responsible for his acts. In such case the sureties are liable, although their principal disregards their conditions and instructions, unless indeed the obligee is guilty either of fraud or rashness in accepting such a bond.¹ And in a Virginia case the court goes farther and holds that if a bond, perfect upon its face, be delivered to the *obligee* as an escrow to be valid on another person's executing it, *it is* valid although the condition is not complied with.² In this case the court relies chiefly upon the common-law doctrine that a deed cannot be delivered to the grantee upon condi-

¹ *Lytle v. Cozad*, 21 W. Va. 188, 199; *Nash v. Fugate*, 24 Gratt. 202; *Smith v. Moberly*, 10 B. Monr. 266; *Millet v. Parker*, 2 Metcf. (Ky.) 608; *Deardorff v. Forsman*, 24 Ind. 481; *State v. Pepper*, 31 Ind. 76; *Passumpsic Bank v. Goss*, 31 Vt. 318; *State v. Peck*, 53 Me. 284; *State v. Potter*, 63 Mo. 212; *Dair v. United States*, 16 Wall. (83 U. S.) 1.

² *Miller v. Fletcher*, 27 Gratt. 405; citing, 1 Shepherd's Touchstone, 58, 59; 4 Comyn. 276, 4 (A) *fait*; Coke Lit. (36 a); Simonton's Estate, 4 Watt. 180; *Duncan v. Pope*, 47 Ga. 445; *Cin. etc., Co. v. Iliff*, 13 Ohio St. 235; *Ward v. Lewis*, 4 Pick. 518; *Currie v. Donald*, 2 Wash. (Va.) 59; *Brackett v. Barney*, 28 N. Y. 333; *Worral v. Mann* (1 Seld.), 5 N. Y. 238; *Jackson v. Catlin*, 2 Johns. 259; 8 Am. Dec. 415; *Black v. Shreve*, 13 N. J. Eq. 456; *Herdman v. Bratton*, 2 Har. (Del.) 396; *Madison, etc., Co. v. Stevens*, 10 Ind. 1; *Brown v. Reynolds*, 5 Sneed, 639; *Gibson v. Partee*, 2 Dev. & Batt. 530; *Graves v. Tucker*, 10 Sm. & Mar. (Miss.) 9; *Fireman's, etc., Co. v. McMillan*, 29 Ala. 147, 161.

tion as an escrow, that in such case the delivery is absolute and the condition invalid. The contrary doctrine is held in several West Virginia cases, the principal of¹ which is that the delivery upon condition is in contemplation of law no delivery at all, that the obligee being notified that the instrument was imperfect cannot be held to have accepted it as perfect, or by his acceptance to have perfected it against the intention and wishes of all others concerned in the transaction.

§ 167. Execution of bond — Obligors bound although their names are not recited. — When parties subscribe their names as obligors in a bond and acknowledge the same as their act and deed in the presence of subscribing witnesses, or otherwise comply with the requirements of the law in such cases, it is wholly immaterial whether or not their names are set forth in the body of the instrument. If their names are omitted, that fact is no defense in an action on the obligation, and to recognize it as such, would be to allow them to escape upon a most flimsy technicality.²

§ 168. Official bonds executed in blank — When obligatory on the surety. — It is a well established general rule that irregularities in the execution of official bonds do not affect their validity, unless they are known to the obligee. Among other irregular practices, that of executing bonds in blank by sureties, fall within this rule. If a surety executes a bond of this character in blank, and delivers it to his principal, the latter is his agent, and not the agent of the obligee, and the surety is fully bound by the acts and omissions of the principal obligor, acting as his agent.³

¹ *Stuart v. Livesay*, 4 W. Va. 45, 50; *Newlin v. Beard*, 6 W. Va. 110.

² *Howell v. Parsons*, 89 N. C. 230; *Van Hook v. Barnett*, 4 Dev. 268; *Pequawkett, etc., v. Mathes*, 7 N. H. 230; *s. c.* 26 Am. Dec. 737; *Moore v. McKinley*, 60 Iowa 367, 370.

³ *Mutual, etc., Co. v. Wilcox*, 8 Biss. C. C. 197, 203; *s. c.*, 4 Myers' Fed. Dec. § 635; citing, *Dair v. United States*, 16 Wall. (83 U. S.) 1; *Butler v. United States*, 21 Wall. (88 U. S.) 272.

§ 169. Execution of official bond — To whom it should be made payable. — When an officer is required to give an official bond, and the personage to whom it is to be made payable is designated, if that obligee is repealed out of official existence, the bond should be made payable to the board or officer upon whom the repealing statute devolved the duties of the extinguished functionary, although by legislative inadvertence, the duty of being obligee in the bond is omitted. So it was held in Michigan, when the office of county commissioner was superseded by that of supervisors, and the bond of the treasurer, which, under the old law, was to be made payable to the former, was held to be properly made payable to the latter. The court said that, in any event, the bond was valid as a statutory bond, basing its ruling upon decisions, that a voluntary bond, taken by authority of proper officers to secure public money, is a valid contract, binding the securities as well as the officer.¹

§ 170. Official bond must be payable to the proper obligee. — A bond given to the wrong person cannot be good as an official or statutory bond, as where a replevin bond was made payable to the officer instead of the defendant, as required by law. Such a bond was held void as a statutory bond, because it did not follow the statute, and as a common-law bond, because its effect and purpose was to aid and abet a trespasser. Therefore it was illegal and void.² But if a forthcoming bond be given to the wrong person, as to the officer and not the plaintiff, it is bad as a statutory bond, because the statute is not followed in a matter of substance, and good as a common-law bond, because it does not contravene public policy nor promote a violation of law.³

¹ Supervisors, etc., *v. Coffenbury*, 1 Mich. 355, 358; citing, United States *v. Tingey*, 5 Pet. (30 U. S.) 115.

² Purple *v. Purple*, 5 Pick. 226.

³ Johnston *v. Merriweather*, 3 Call, 523.

§ 171. Form and essentials of official bonds. — It is usual in statutes prescribing the execution of official bonds, to designate the obligee. It is not material, however, that such rules be complied with very strictly, so that there is substantial conformity to the statute. Thus, a bond was good as a statutory bond, although made payable to the "People of the State of California," instead of the "State of California," as required by the statute. The court said: "All that is requisite to constitute a good bond on this point is that it should have a certain obligee, so that there be no mistake as to the one to whom the service or duty is owing." And the court seems equally sensible and liberal as to matters of substance. Where a statute prescribed no condition for the bond of an officer (notary public), declaring, however, that he shall be liable on his bond for any misconduct or neglect of duty, the court held that a condition that the notary should faithfully perform the duties of his office, fully met all the requirements of the law, and was, indeed, the only condition that could be properly, inserted in the bond.¹

§ 172. Form of official bond — Rules on that subject. — It is not necessary that an official bond shall literally follow in words the form prescribed by a statute, unless, indeed, the statute expressly declares that it shall. It is sufficient if it includes in substance all the material requirements of the law, and an undertaking in their bond by a sheriff and his sureties that he shall "well and faithfully execute the same office in all things appertaining thereto," was a sufficient compliance with the statute of Maryland, prescribing the execution of sheriff's bonds. And in the same connection it has been held that the omission of an attestation of the bond by the officer or tribunal designated by law, in no degree impairs its validity as a statutory

¹ *Tewis v. Randall*, 6 Cal. 632.

bond, because the attestation was required by law, not for the benefit of the obligors, but for that of other persons. It was not intended to limit their liability, but to render it certain. Bonds in which the liabilities imposed were in excess of those required by the statute have been declared void with manifest reason.¹ And where the liability sought to be enforced is not covered by the bonds on which the suit is prosecuted, the action must fail, of course,² but such cases are in no respect analogous to one in which an escape from liability is sought on the ground that a ceremony was omitted, which was designed, not for the benefit of the obligors, but to bind them the more thoroughly.³

§ 173. Terms of official bond — What is essential and what superfluous. — It is generally sufficient if the terms of the bond correspond with the meaning expressed in the statute, and on the other hand a bond is not invalidated by the unnecessary reduplication of adverbs which do not vary the meaning of the statute, nor impose any new condition which the law does not authorize. Thus, a bond prescribed by law for the “ faithful performance of his duties,” was made to read, “ shall well and truly, faithfully, firmly, and impartially execute and perform,” etc. The sureties sought to escape on the ground that these words unlawfully imposed upon their principal other conditions than for the faithful performance of the duties of his office. The court, however, held that these words, “ well, truly, firmly, impartially,” were simply redundant, and the bond meant no more with them than without them; that they meant “ faithfully,” neither more nor less, but added: “ It is an error to suppose that the agreement to perform the duties

¹ United States *v.* Morgan, 3 Wash. C. C. 10; Stewart *v.* Lee, 3 Cal. 364.

² Johnson *v.* State, 3 Harr. & M. 221; Quinn *v.* State, 1 Harr. & J. 36; Branch *v.* Commonwealth, 2 Call, 510; Morgan *v.* Backiston, 5 Harr. & J. 61; Morgan *v.* Morgan, 4 Gill & J. 395.

³ Young *v.* State, 7 Gill & J. 253, 262.

of the office faithfully, means merely that the incumbent will not wilfully do any wrong act. It has a stretch beyond this and is broken by a neglect, or by carelessness in discharge of the official duty, as well as by an intentional misfeasance.”¹

§ 174. Approval of bond—Whether acceptance or not.—In most of the states it is provided that official bonds shall be approved by a suitable official personage, and it depends wholly upon the language of the statute whether such approval is part of the delivery and acceptance of the bond, and essential as a condition precedent to its validity, and to the title of the principal obligor to his office. In Arkansas it is held that under the laws of that state, although it is the duty of the state treasurer to present his official bond to the governor for his approval, yet if he fails to do so, obtains his commission and is inducted into his office, he and his securities are as fully liable upon his bond as if every provision of the statute had been strictly complied with; that the approval of the governor neither increases nor diminishes the obligation of the contract entered into by the treasurer and his sureties; that the approval is not a condition precedent to the validity of the bond or the liability of the sureties; that the instrument became perfect by execution and delivery as at common law; that the failure of the governor to approve does not operate as a defeasance or release; and, with manifest reason, that the obligors cannot be permitted to take advantage of their own wrong in failing to secure the approval of the proper officer.²

§ 175. Approval of bonds—Defect in—When unavailable for surety as a matter of defence.—Attempts are

¹ Mayor, etc., *v.* Evans, 31 N. J. L. 342.

² Auditor *v.* Woodruff, 2 Ark. 73; 38 Am. Dec. 363; Taylor *v.* Auditor, 2 Ark. 174.

frequently made by officers and their sureties to evade the responsibility on their official bonds, on the ground that the bond was not approved by the proper officer, or in the appropriate manner, or not approved at all. They have usually failed, for the obvious reason that if the officer has been inducted into office, and thus enjoyed the advantage afforded by the execution of the bond, it does not lie with him or his friends to controvert the validity of their obligation, because of the omission of a ceremonial which is not intended for their protection, but the precise reverse, to protect the public against them. The courts, therefore, in such cases, very readily accept slight proof of approval of bonds, under which the obligors have gone into office. Hence, in Missouri, a bond was held to be approved because it was handed to the clerk of the county court in vacation, who marked it "filed," and put it away in a proper place in his office. Indeed, the court went so far as to say that the failure of the county court to either approve or reject at all, in no degree invalidated the bond.¹

§ 176. Approval of official bond — In whose interest and for what purpose prescribed. — And in California it is said that the approval of an official bond is a precaution required exclusively in the interest of the public, and its omission can in no event and under no circumstances enure to the benefit of the obligors. The object of the law requiring it is to insure greater security for the public interests affected by it. Therefore it does not lie with the obligors to complain that their bond was accepted without due examination into its sufficiency. And the fact that the bond of an officer was approved by the county judge instead of the board of supervisors, forms no defence to an action on the bond.²

¹ *Jones v. State*, 7 Mo. 81, 85; 37 Am. Dec. 180. See, also, *Moore v. State*, 9 Mo. 334.

² *Mendocino County v. Morris* 32 Cal. 145; *People v. Evans*, 29 Cal. 436; *People v. Edwards*, 9 Cal. 286.

§ 177. Approval of official bond—Is a ministerial duty.—The approval or rejection of an official bond by a court, board, or officer to whom that duty is confided, is in Missouri a ministerial, not a judicial duty, although it is coupled with a discretion. And when the law devolves upon an officer the exercise of a discretion, it is a sound and legal, not a capricious, arbitrary, and oppressive discretion. In the case of the approval or rejection of an official bond, the discretion with which the court or functionary is entrusted is confined to an examination of the sufficiency of the security offered.¹

§ 178. Sufficiency of sureties—General rule as to justification of sureties.—The rules by which the execution of official bonds, with reference to the number, qualifications, and sufficiency of the sureties required, provisions for their justification, etc., are multitudinous, being dependent upon an infinite variety of statutes, by-laws, regulations, orders, etc., from which it would be difficult, if not impossible, to evolve any general principle. The nearest approximation to such a result is that when two or more sureties are required by the law or order controlling the subject, and a sum is fixed in which the sureties are severally to justify, each of the sureties offered must swear that he is worth that sum after payment, etc., and if one of two sureties is worth much more than the prescribed amount, his surplus cannot be made available to supply the deficit of his co-surety. Thus, a surety worth \$200,000, and another worth \$10,000, would not suffice if the order required two sureties worth \$50,000 each. The deficit must be made up by additional sureties, whose aggregate wealth exceeded \$50,000. Such is the ruling of a New York court upon a statute of that state, and the same principle is obviously applicable elsewhere. The object of requiring security at all is, of course, to reduce the probability of

¹ State, etc., v. Lafayette County Court, 41 Mo. 221

loss to a point as near the minimum as conveniently practicable; that of requiring *two* sureties is to double the chances of indemnity. One bondsman, although very wealthy, may become insolvent in the course of time; if his co-security is financially feeble, and unable to respond to the requirements of the obligation, the object of the duplicate security is manifestly frustrated.¹

§ 179. Construction of official bond — Rule as to general and special terms. — The rule in the construction of official bonds is that particular words cannot be controlled by the general terms contained, or set forth in the condition. And when a bond is given for a specific object the general words embodied in the condition can only be construed with reference to the specific object for which the bond was given. Hence, a bond providing for the collection of a specific county tax cannot be made to include the collection of the general tax because of the obligation expressed in it to "satisfy all sums and fees received or levied by him, by virtue of any process and for the faithful performance of the duty of sheriff." These words the court holds, refer only in that bond to the specific county tax for which the bond was given.²

§ 180. Construction dependent upon language used. — It is well settled that the terms of an official bond constitute the measure of the liability of its obligors. And upon this rule the principal and his sureties have been held liable for money collected as taxes which the tax-payers were under no obligation to pay, and the collector had no right to receive. Thus, a collector of taxes, took from his deputy a bond with security conditioned that the deputy should pay over to his principal or his successor, "all moneys that might come into his hands by virtue of his office;" under

¹ *Trask v. Aunett*, 1 Demarest, 172.

² *Crumpler v. Governor*, 1 Dev. L. 52, 59.

this appointment the deputy collected taxes on incomes not levied or due until after the time they were collected. The court held the sureties of the deputy liable because the money so collected came into the hands of the deputy by virtue of his office.¹

§ 181. Construction of official bond — Liability controlled by the terms of the bond. — In the construction of official bonds general terms used in it must be referred to the subject matter of the bond, and its operation restricted to that matter. For example, an Indian agent who having been appointed and assigned to service as agent for Indians, in Washington Territory, and had given a bond in accordance with that assignment, could not be held liable upon that bond for money and property received by him while acting as agent for Indians in the state of Oregon. And this, although he was required by the law authorizing his appointment to give a bond, with such conditions as might be prescribed by the President of the United States, or the Secretary of the Interior; and although the bond which he did give contained the condition that he should account for *all* public money and property which should come into his hands. This general language the court said must be referred to the subject matter — the purpose and object of the bond — which was to secure the faithful performance of the obligor's duty as "agent for the Indians in Washington territory," and nothing more.²

§ 182. Construction of bond — Limitation of conditions by recitals. — It is well settled that the recitals in a bond operate to limit and to control the conditions, although such conditions be expressed in general terms; if the undertaking is general, it is restrained, and its obligation limited

¹ *Fuller v. Calkins*, 22 Iowa, 301, 304; citing, *Gilbert v. Isham*, 16 Conn. 525; *Warren County v. Ward*, 21 Iowa, 84.

² *United States v. Barnhardt*, 17 Fed. Rep. 579.

within the terms of the recitals.¹ Questions may, however, arise upon the construction of the recitals themselves. Thus where the tenure of an office was for one year and until his successor should be elected and qualified; a recital that the principal was elected "for the next ensuing year," limits the liability of his sureties not to twelve calendar months, but to the full term including the much contested interval between the expiration of the term and the qualification of the successor. In making this ruling the court concedes that if the "town or municipal authorities delay for an unreasonable time to require the outgoing officer to close his accounts, and pay over the balance in his hands to his successor, especially if it is shown that the sureties have been prejudiced by the delay, it may be that the sureties are thereby discharged." It, however, expressly declines so to decide, as a decision on that point was not deemed necessary.²

§ 183. Construction of official bond — When not governed by the law of the place where executed. — The general rule is, that the law of the place where the contract is made, and not where the action is brought, governs the construction unless the intention of the parties is that it is to be executed elsewhere. In that case, the construction is governed by the law of the place where it is to be executed.³ In case of an official bond, however, given by an officer of the United States government, the rule is that no matter where it is in fact executed, or where the duties are to be

Sanger *v.* Baumberger, 51 Wis. 592; citing, Bell *v.* Bruen, 1 How. (42 U.S.) 169; Arlington *v.* Merricke, 2 Saund. 403; Liverpool, etc., Works *v.* Atkinson, 6 East. 507; Wardens *v.* Bostock, 2 Bos. & Pul. 175; Leadley *v.* Evans, 2 Bing. 32; Peppin *v.* Cooper, 2 Barn. & Ald. 481.

² City Fon du Lac *v.* Moore, 58 Wis. 170; citing, Supervisors *v.* Kaime, 39 Wis. 468.

³ Hunter *v.* Potts, 4 Term, 182; Alves *v.* Hodgson, 7 Term. 242; Smith *v.* Smith, 2 Johns. 241; Thompson *v.* Ketchum, 4 Johns. 285.

performed, it shall be construed as if in fact executed, and its obligations were to be performed at Washington city, as the accountability of the officer for non-performance is at the seat of government. The law in force in that place and under that government furnishes all the rules for the construction and enforcement of the contract, and the local laws of the place where the contract was executed, as well as those of the place where the duties prescribed were to be performed, have no influence whatever, upon the construction of the contract in any respect.¹

§ 184. To whom and for what the obligors of official bonds are liable. — The rule has been repeatedly stated that the liability of the sureties on an official bond depends chiefly upon its terms. Not only is it limited by those terms as to what the sureties are liable for, but also to whom they are responsible. Third persons generally can have no beneficial interest in a bond of this character, unless a provision to that effect is embodied in the statute which authorizes the bond. The condition of a tax collector's bond in Mississippi was, that he shall collect and pay into the treasury of the state or county treasury, all the "state and county taxes, etc., and shall do and perform all other duties which pertain to his said office, etc. It was held that this condition covers nothing more than such duties as the statfute prescribes, and does not include the duty of paying the printer for advertisements of tax sales, although it is made the express duty of the collector to advertise such sales. "The bond," says the court, "is not a security for any services rendered to the collector by individuals. It is a security for the state and county only, and the sureties have a right to stand upon the strict terms of their contract."²

¹ *Cox v. United States*, 6 Pet. (31 U. S.), 172, 204; *s. c. 4 Myers' Fed. Dec. § 404.*

² *Brown v. Phipps*, 6 Smed. & M. 51.

§ 185. Language of official bonds — Construction of irregular expressions and omissions. — Official bonds are rarely drawn in so inartificial a manner that it is difficult or impossible to distinguish who is principal and who is surety; still less that it should appear by the instrument that each of the dozen or more obligors was both principal *and* surety. The feat of drawing an official bond of this extraordinary character was accomplished in Virginia something over thirty years ago. A *high* sheriff (so-called in that state) exacted a bond from his deputies, the names of fourteen persons were inserted in the penal part of the bond, the condition recited that he had admitted the above, bound

his deputies in the office, etc. Then — “Now if the above bound shall well and truly discharge,” etc. The blanks were not filled with the names of the persons who were to be deputy sheriffs. Two of the persons whose names were recited in the bond did not sign it, and one volunteer whose name was not inserted, did sign it.

This document coming up for construction by the Virginia court of Appeals elicited the following remarkable, but perfectly accurate rulings: —

1. That as there was nothing in the bond to indicate that all the *above bound* obligors were not appointed deputies, they were estopped by their hands and seals from denying that they were each and all deputy sheriffs.

2. That deputy sheriffs have no joint interest in the office, one is not responsible for another by virtue of the office, but only by virtue of an express undertaking, that the bond was such an undertaking by its terms making them responsible for each other. Consequently each obligor was a deputy sheriff, all the others being his sureties.

3. That the fact that two of the recited obligors did not sign the bond, did not vitiate it, but each of those who did sign it was bound by it.

4. That the signing of the bond by the party whose name was not recited in it had no effect to invalidate it,

but he also was bound as an obligor. The result was that the sheriff was held to have thirteen deputies, each deputy having a dozen sureties.¹ This is rather a strange result of a couple of omissions. A blank is a nonentity, a nullity, yet this nullity, although *ex vi termini*, inefficient, and innocuous, passing through the magic crucible of judicial construction, suffices against the known wishes and intentions of all concerned, to transform eight or ten bondsmen into deputy sheriffs, and to make each of the baker's dozen responsible for the official acts of every other of the multitudinous deputies.

§ 186. Insensible condition — Effect of, in official bond.—If any portion of the condition of a bond is so far defective as to render the condition itself insensible, so that it cannot, by legal construction and intendment, be made coherent and perfect, the condition must be held void and the bond itself absolute. If such is the condition of an official bond, it becomes the evidence of an absolute debt to the state, and consequently no private person can cause suit to be instituted on it for his use, or declare upon it as relator. Thus, in the condition of an official bond the name of the person described as the officer was left blank, so that it did not appear who of the three or four obligors was the officer, the condition of the bond was held to be insensible, by reason of such omission, and a suit upon the bond at the relation of parties interested, could not be maintained.²

§ 187. What will show a bond to be insensible and render it void for uncertainty. — It is, of course, necessary

¹ *Cox v. Thomas*, 9 Gratt. 312, 316; citing, *Morrow v. Peyton*, 8 Leigh. 54; *Kirby v. Turner*, 1 Hopkins Ch. 809; *Brazier v. Clark*, 5 Pick. 96; *Towns v. Ammidown*, 20 Pick. 535; *Clark v. Williams*, 6 Gill & J. 288; *Liddersdale v. Robinson*, 2 Brock. C. C. 160; *Green v. Hanbury*, 2 Brock. C. C. 408; *Luster v. Middlecoff*, 8 Gratt. 54; *Berry v. Homan*, 8 Gratt. 48.

² *State v. Hill*, 6 Jones (N. C.), 572; 27 Am. Dec. 406.

for a bond, as for any other legal instrument, to express the meaning of its obligors, if not in technical language, at least with sufficient clearness and precision to be readily understood. If it fails to express any meaning at all, or any meaning pertinent to the subject, it is said to be insensible; if it is equally liable to several different constructions, or so defective as not to express fully any definite meaning, it is uncertain. In either case it is void. A striking example of this kind of a bond is found in a late Connecticut case. A person was appointed "conservator" of the estate of one incapable of transacting her own business, and proceeded to execute a bond supposed to be intended to secure the due discharge of his duty. He took a blank administrator's bond, and without any attempt to adapt it to the purpose for which it was designed, filled it up so that it read precisely as if his ward was dead instead of being "incapable." Once only it speaks of her as "an incapable person," but otherwise, throughout, follows the administration form. The court held the condition of the bond to be an unmeaning collection of words, and the bond itself to be void for uncertainty.¹ It is hard to say which was the more perfect and admirable in its kind, the consummate *cheek* of the "conservator" and his surety, in imposing such a bond upon the probate court, or the infantile simplicity of that tribunal, whose wits as manifestly needed "conserving," as did the estate of the unfortunate imbecile, herself.

§ 188. Construction of bond—Must be reasonable.— Although the rule is, that the liability of sureties is to be strictly construed, it is equally the law that such construction must also be just and reasonable. Thus, a bond, the condition of which was that the principal obligor should faithfully expend all public moneys, and account for all

¹ *Hayden v. Smith*, 49 Conn. 88.

public property placed in his hands, was held to bind the obligor to account for the public money as well as the public property. Without a proper accounting the court asks who can judge whether the money has been faithfully expended?¹

§ 189. General expressions, when sufficient in official bond. — It is neither necessary nor proper that the condition of an official bond should include, in express terms, that which can be fairly and even necessarily implied from the other words inserted in it. Thus, it would be mere surplusage, that in the condition of the bond of a clerk and master, there should be a stipulation that he should pay over money received by him officially, when in the condition there was an obligation for “the faithful discharge of the duties of his office.” This latter clause, it was held, included the obligation to pay over money officially received, and that money received by such an officer as the proceeds of a judicial sale of lands for partition, was officially received, for such a sale, made by a clerk and master, under the decree of a court of equity, was an official act.²

§ 190. Succession of obligee in official bond — Construction of bond in such a case. — It is a very wholesome rule that when a bond is executed by appointment of law, and made payable to an official person for the benefit of others, the right to said bond and duty under it, vests in the obligee in his official capacity only, and when he is divested of his official character vests at once in his successor, even if no words of succession are used in the bond. Upon this principle it was held that indentures of apprenticeship made to a chairman of a county court were valid and obligatory in favor of his successor, although no words of succession were used in the instrument.³

¹ United States *v.* Lent, 1 Paine C. C., 417, 421.

² Judges *v.* Dean, 2 Hawks. 93.

³ Dowd *v.* Davis, 4 Dev. L. 65; citing, *Anon.* 1 Haywood, 146.

§ 191. Construction of official bond — Rule when bond does not contain all that the statute requires. — A bond purporting to be an official bond does not lose its character as such, and the peculiar privileges and remedies accorded to such bonds by statute, because, containing nothing that the statute does not authorize, it fails to contain *all* that it requires. Thus the bond of a constable in North Carolina, which was conditioned for the faithful discharge of his duty “agreeably to an act of Assembly,” etc., was a valid official bond, although the further condition prescribed by statute that “he should diligently endeavor to collect all claims, etc.,” was omitted. Upon such a bond suit could be brought in the name of the governor for the time being, successor to the official obligee.¹

§ 192. Construction of bond — When an official bond becomes operative. — The time when an official bond takes effect is often a matter of much importance to the parties interested in it. The rule controlling deeds generally is, *traditio loqui facit chartam*, or deeds speak from their delivery.² The bonds of officers designed to secure a faithful discharge of their duties form no exception to the rule, and the only question which has arisen upon the subject is: When is an official bond delivered? A collector's bond might be deemed to be delivered when it was put in a course of transmission to the comptroller of the treasury. This class of officials, however, was exceptional, in that a collector was authorized under the act of Congress to exercise his office for three months without any bond, so that the delivery and approval need not be simultaneous, and the approval need not precede the delivery.³ The rule with postmasters is different. They must give bonds which

¹ Governor *v.* Miller, 3 Dev. & Batt. 55.

² Clayton's Case, 1 Coke, 1: Ozkey *v.* Hicks, Cro. Jac. 263; Steele *v.* Mart, 4 Barn. & C. 272.

³ Broome *v.* United States, 15 How. (56 U. S.) 143.

must be accepted by the postmaster-general as sufficient in point of amount and security before they can have any effect as contracts. Until his bond is so accepted, the postmaster has no right to act. Hence, a postmaster's bond speaks from the time of its approval by the Postmaster-general; and the recitals in it relate to the time of its reaching the postmaster-general and its acceptance by him. So far as the officer's commission is concerned, it is not essential to his investiture with the office. When his commission has been signed and sealed, and placed in the hands of the postmaster-general for transmission to the appointee, the execution of the commission is complete, and it is the duty of the postmaster-general to transmit the commission when the bond shall have been delivered and approved. Hence, the death of the President after he had signed the commission of a postmaster, and while it was in the hands of the postmaster-general, had no effect on the validity of the commission which was perfected as soon as it was signed by the President, and had the great seal affixed to it.¹

§ 193. The law as a part of the contract embodied in an official bond. — It is a rule that the law enters into and is a part of every contract. What that law is, has been matter of much discussion, but this much is conceded on all hands, that the law relating to the subject-matter, which is in force at the time the contract is executed, is a part of the contract, which is deemed to have been made with reference to it. And it has been held that all laws enacted during the continuing contract of an official bond, is also part of the contract and that the obligors entered into their engagement in view of the possible and probable modifications of their

¹ *United States v. Le Baron*, 19 How. (60 U. S.) 78, 79; *s. c.*, 4 Myers' Fed. Dec., §§ 256, 257, 261. See, also, *Bruce v. State*, 11 Gill & J. 382, in which it was held that the bond of a sheriff took effect only when approved by the county court; because it was only on such approval that the sheriff was authorized to act.

liability by the legislative branch of government. Hence, a collector of customs, is bound by the condition of his bond to discharge the duties of his office according to the law as it existed at the date of his bond, and as it existed at every period during his term of office, and his sureties are not discharged by any alteration in the law during that term, unless it materially changed the character of the office.¹

§ 194. Effect of condition more onerous than the law requires.— It has been elsewhere shown that if a superior officer exacts from his inferior as condition precedent to his induction into office, a bond more onerous in its conditions than the law authorizes, the bond is void so far as it purports to exact illegal or extra-official duties, or impose unlawful liabilities. But if a person voluntarily gives to an officer a bond, the obligation of which is greater than the officer is authorized to require, he and his sureties, are bound thereby, to the full extent of the condition. Thus, where a party receiving from a sheriff property that had been levied on, gave a bond conditioned for the re-delivery of the property *or* the payment of the execution, he was bound by the latter condition, although the condition should have been either to re-deliver the property or pay its value. The obligors having voluntarily assumed a greater liability than the law required of them, are bound thereby.²

§ 195. Liability for special duties imposed by law upon the officer.— There are sometimes special and irregular duties imposed by law upon an officer, and partial provision made for securing the due performance of those

¹ *United States v. Gunssen*, 2 Woods C. C. 92, 99; *s. c.*, 4 Myers' Fed. Dec., § 279. See, also, *Postmaster-General v. Munger*, 2 Paine C. C. 189; *Boody v. United States*, 1 Woodb. & M. 150; *Pybus v. Gibb*, 6 El. & Bl. 903; *s. c.*, 88 Eng. Com. Law, 910; *People v. Vilas*, 36 N. Y. 459; *Broome v. United States*, 15 How. (56 U. S.) 157; *Converse v. United States*, 21 How. (62 U. S.) 463.

² *Slutter v. Kirkendall*, 100 Penn. St. 307, 312; *People v. Reeder*, 25 N. Y. 302; *Burrall v. Acker*, 23 Wend. 606; 33 Am. Dec. 582.

duties. Out of these arise questions involving the liability of the officer and his sureties on his bond for the discharge of these supplemental duties. In Arkansas, the sheriff is, in proper cases, the public administrator, and by section 7 of the code, his sureties on his official bond are made responsible for his conduct in that capacity. By section 8 the public administrator is required to give security as are ordinary administrators, whenever the estate exceeded \$3,000 in value. By a later act section 8 is repealed and the public administrator is required to give security in all cases in which property should come into his hands to be administered. Upon this state of the law the question arose whether or not section 7 was repealed as well as section 8, and whether the sureties of a sheriff on his official bond were liable for his default in the character of public administrator, he having executed the bond required by him in that character. The court concluded, "but with much hesitation," that although a special administration bond had been furnished by the sheriff as public administrator, his sureties on his official bond as sheriff were also liable for his misconduct in discharging the duties of public administrator.¹

§ 196. Bond good in part, and bad in part — Retrospective condition when void. — Official bonds are frequently irregular, and either from ignorance, immoderate caution, or a disposition to oppress and annoy the obligors, contain more stringent conditions than the law requires; or else from carelessness, favoritism, or other unworthy motive exact less from the officer and his sureties than he and they should undertake. It has been held that when the condition of a statutory bond contains more than is required by the law, the bond is not thereby invalidated if the bad can be eliminated from the good. Thus, where a bond is otherwise regular and accurate, but in addition to the appropri-

¹ State *v.* Watts, 23 Ark. 304.

ate prospective conditions, contains one that is wholly retrospective (the law contemplating only prospective conditions), it was held good as to the prospective conditions but invalid as to those which were retrospective. If, however, the statute in prescribing the execution of a bond sets out the form which must be pursued, and declares that if it be not so taken it shall be void, a bond illegally retrospective cannot stand good for any purpose, however lawful.¹

§ 197. When officer collecting public money becomes an insurer. — The rule is well established, that a common bailee is liable only, for ordinary care, and is not responsible for losses caused by irresistible force. The duty of a receiver of public money, merely as such, *virtute officii*, and in the absence of contract, extends no further than that of such a bailee, and his liability is commensurate with his duty. He need only bring to the discharge of his trust that prudence, caution, and attention which careful men bestow upon the conduct of their own affairs. If he does this he escapes scatheless. But if, as he is almost always bound by law to do, he executes a penal bond in which he binds himself to perform the duties of his office without exception, he becomes an insurer. There is a well established difference between a duty created merely by law and one to which is added the obligation of an express contract. The law does not compel the performance of impos-

¹ United States *v.* Brown, Gilpin (U. S. D. C.) 155, 158; *s. c.*, 4 Myers' Fed. Dec., §§ 234, 237. In this case the whole subject is very thoroughly considered and many cases cited and reviewed, viz.: Purple *v.* Purple, 5 Pick. 226; Johnston *v.* Meriwether, 3 Call. 523; Newman *v.* Newman, 4 Maule & S. 70; Warner *v.* Racey, 20 Johns. 74; United States *v.* Sawyer, 1 Gall. 99; Pigots' Case, 11 Coke 27; Norton *v.* Simmes, Hobart, 18; Morse *v.* Hodsdon, 5 Mass. 314; Clapp *v.* Guild, 8 Mass. 153; Armstrong *v.* United States, Pet. C. C. 46; Dive *v.* Manningham, Plowd. 60; United States *v.* Howell, 4 Wash. C. C. 620; Townsend's case, Plowd. 111; Lee *v.* Coleshill, Cro. Eliz. 529; United States *v.* Morgan, 3 Wash. 10; Thatcher *v.* Powell, 6 Wheat. 119; Rex *v.* Croke, Cowp. 29; Bolton *v.* Robinson, 18 Serg. & R. 193; Norton *v.* Syms, Moore (folio), 856.

sibilities, but the statutes which prescribe the conditions of official bonds, invariably require in those of fiscal officers a guaranty that the due performance of the duty undertaken shall not become impossible, and this in effect amounts to the same thing. It is not the *law* which makes such an officer an insurer, but the *contract* expressed in his official bond. The law says: we do not compel to impossibilities, but you shall not have the office unless you guarantee that the performance of your duty shall not become impossible.¹

§ 198. When officers holding public money are not liable as insurers. — In a later case, however, the supreme court of the United States materially modified the ruling just enunciated, but against a strong dissenting opinion. It was held that, aside from his bond, the overruling force arising from inevitable necessity, or the act of a public enemy, is a sufficient answer for the loss of public property in the custody of a public officer; that at common law an officer is a bailee of property in his official custody, and the rules which grow out of that relation control his responsibility; but it was admitted that where an official bond is given, the liability of the obligor arises out of his bond, and the principles which are founded on public policy, and that such liability, under the terms of the bond, and upon grounds of public policy, is far more stringent than that imposed by the relation of bailee. The court, however, proceeds to hold, (and it is to this that the minority of the judges strenuously dissent,) that public officers are not responsible on their official bonds for the loss without their fault, of property in their official custody, in cases of overruling necessity,

¹ *Boyden v. United States*, 13 Wall. (80 U. S.) 17, 25; 4 Myers' Fed. Dig. §§ 263, 264; *The Harriman*, 9 Wall. (76 U. S.) 161; *Muzzy v. Shattuck*, 1 Denio, 233; *Commonwealth v. Comly*, 3 Penn. St. 372; *State v. Harper*, 6 Ohio St. 607; *United States v. Prescott*, 3 How. (45 U. S.) 578; *United States v. Dashiel*, 4 Wall. (71 U. S.) 182; *United States v. Keehlor*, 9 Wall. (76 U. S.) 93.

After admitting that, “ where a party, by his own contract, creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract; ” the court proceeds to hold that a surveyor of customs and depositary of public money, who had given bond, conditioned that he would keep safely all public money placed in his custody, was not liable upon that bond for public money so held by him, which was seized by the rebel authorities by force. The ruling seems to be founded chiefly on the following dictum of Lord Coke: “ In all cases where a condition of a bond, recognizance, etc., is possible at the time of making of the condition, and, before the same can be performed, becomes impossible by the act of God or of the law, or of the obligee, etc., there the obligation, etc., is saved. But if the condition of a bond, etc., be impossible at the time of the making of the condition, the obligation, etc., is single.”¹ This ruling is, of course, conclusive, but it is believed that the learned justice admits away his case before he produces the authorities which tend to support his conclusion. And, besides, the act of rebel authorities in seizing United States funds in the hands of an official depositary, is neither the act of God, nor of the law, nor, manifestly, of the obligee, and as it was the act of the rebel authorities which rendered the performance of the condition impossible, the case does not fall within the rule laid down by Lord Coke. The weight of authority is clearly in favor of the dissenting minority of the court, who, following the opinion in the case of *United States v. Prescott*,² state the true rule on the subject thus: “ That the depositary and his sureties having given a

¹ *United States v. Thomas*, 15 Wall. (82 U. S.) 337, 355. The court cites, for this principle, Coke Litt. 206 (a); 2 Thomas' Co. Litt. 22; Shepherd's Touchstone, 372; 2 Blkst. Comm. 340, 341; Bacon's Abridg., Title Condition (N.), 2; Comyn's Dig., Title Condition (D.), 1.

² How. (44 U. S.) 578.

bond, the condition of which was an express contract to pay or deliver, they were bound by that contract, according to the rigid terms which the law annexes to such covenants or promises.”¹

§ 199. Same subject continued. — And in a case in the United States circuit court for South Carolina, the doctrine is distinctly held that the compulsion of military force by rebel authority operates as an irresistible necessity, and abrogates the obligation incurred by the execution of the official bond, by the officer and his sureties. The court, in its charge to the jury, stipulates that on the part of the obligor there shall be no collusion, contrivance, evasion, or willingness, and that the surrender of the public property shall be upon compulsion, indicated by threats of actual force, made by persons abundantly able to use it. This being conceded, the court decides that under these circumstances, an officer is justified in surrendering public property to rebel authority, and is released from the obligation of his bond by irresistible necessity.²

These rulings, it may be remarked, grow out of the very exceptional conditions under which the cases arose, the prevalence of civil war, and the excessive hardship of holding officers liable for losses caused by the exercise of overwhelming force by a public enemy. It may well be believed that at some future period the doctrine will be reviewed,

¹ *United States v. Thomas*, 15 Wall. (82 U. S.) 337, 355; *s. c.*, 4 Myers. Fed. Dec. 337, 355; citing, *Wren v. Kerton*, 11 Ves. 381; *Utica Insurance Co. v. Lynch*, 11 Paige, 520; *Knight v. Ld. Plymouth*, 3 Atkyns, 480; *Rowth v. Howell*, 3 Ves. 566; *Burke v. Trevitt*, 1 Mason, 96, 100; *Lane v. Cotton*, 1 Ld. Rayd. 640; *Whitfield v. LeDespencer*, Cowp. 754; *Dunlop v. Monroe*, 7 Cranch (11 U. S.), 242; *Wheeler v. Hambright*, 9 Serg. & R. 396; *Muzzey v. Shattuck*, 1 Denio, 233; *Supervisors v. Dorr*, 25 Wend. 440; *United States v. Prescott*, 3 How. (44 U. S.) 587; *State v. Harper*, 6 Ohio St. 607; *Paradine v. Jane*, Aleyn, 26; *Bevans v. United States*, 13 Wall. (80 U. S.) 56; *Farrar v. United States*, 5 Pet. (30 U. S.), 373.

² *United States v. Huger*, 1 Hughes C. C. 397.

the anomaly abrogated and the symmetry of the law restored.

§ 200. Same subject continued. — In this connection, it is as well to consider several other rulings, made by courts of high authority, on the subject of inevitable necessity as connected with official bonds. It is no defense to a suit on the bond of a receiver of public money, that the money was stolen from him without his fault.¹ Or that it was taken from him by force.² Or that the money was lost by shipwreck during a lawful transportation.³ And further, an officer in charge of public money is liable for it upon his official bond if it is lost by the insolvency of a bank in which it was deposited, although the bank was one that had been selected by the government for the use of its officers and agents.⁴ It is no defense that the officer had paid the public money to a creditor of the government, that not being part of his official duty, and such a payment is not available as an equitable set-off. Still less can it be an excuse that the money was paid to the Confederate government, if it is not shown that the officer yielded to superior force.⁵

The sum of the whole matter seems to be, that where the public money is placed in the hands of an officer who has given no bond, and no special safeguards are provided by statute, he is liable as a bailee for hire, for ordinary care and diligence. And this liability is not abrogated by his giving a bond which is a cumulative security to that created by the common law, for the bond does not extinguish his

¹ *United States v. Prescott*, 3 How. (44 U. S.) 578; *United States v. Dashiel*, 4 Wall. (71 U. S.) 182.

² *Bevans v. United States*, 13 Wall. (80 U. S.) 56; *Halliburton v. United States*, 13 Wall. (80 U. S.) 63.

³ *United States v. Hamason*, 6 Saw. C. C. 199.

⁴ *United States v. Freeman*, 1 Woodb. & M. 45; citing and following *United States v. Prescott*, 3 How. (44 U. S.) 578.

⁵ *United States v. Keehler*, 9 Wall. (76 U. S.) 83.

individual simple contract liability.¹ The liability created by the bond, is, of course, dependent upon the terms prescribed by the statute and expressed in the bond. If those terms, by fair construction, make him an insurer of the public money in his hands, he *is* an insurer, and no exception is available unless it is made in the statute or in the bond, or can fairly be implied from one or the other.

§ 201. Liability for stolen money — Controlled by terms of bond. — The rule as to the liability of public officers for money committed to their custody by the law of the state, is not uniform. Receivers and custodians of the money of the United States are, upon principles of public policy, held absolutely bound. There are several cases in which it has been decided that the liability of such officers is that of a bank which receives a deposit, that they become debtors by the receipt of the money, and that the loss of the specific fund by robbery or theft constitutes no excuse for non-payment in accordance with the law. The same rule is applied in many of the states to officers charged with the safe keeping of the public funds, as treasurers and other officers performing similar duties.² In Iowa, the rule so far as relates to county treasurers, is less rigid. There it was decided that under the law of the state a county treasurer might be permitted to prove in defense of an action on his official bond, that without his fault or negligence money which he had received as treasurer had been stolen from the treasury, and that such an excuse, if established by adequate proof, was a sufficient defense to the action. The court said: “The duties and responsibilities of the defendant are, however, fixed by his official bond, and from it the measure of liability incurred by him in the preservation and

¹ *Walter v. United States*, 9 Wheat. (22 U. S.) 655.

² *Com. Bank, etc., v. Hughes*, 17 Wend. 100; *Muzzy v. Shattuck*, 1 Denio, 233; *Supervisors, etc., v. Door 7 Hill* (N. Y.) 584, note; *United States v. Prescott*, 3 How. (44 U. S.) 578.

disposal of the money received by him as treasurer is to be ascertained and determined. The condition of the bond is that he will exercise ‘reasonable diligence and care.’ When he has done this much, he is not liable on his bond for any loss of the money occurring by theft or casualty.” Of course, everything depends upon the terms of the officer’s contract as prescribed by statute and embodied in his official bond; generally the terms of those instruments do not bear so lenient a construction.¹

§ 202. Liability of sureties upon general terms of the bond. — The strict construction which, for the benefit of sureties, the law accords to their obligations, does not exclude a fair construction of the instrument from which those obligations are derived. Thus, where a navy agent was required by the terms of his commission, among other things, to observe the orders of the president and the secretary of the navy, and money was advanced to him by order of the secretary of the navy, but without the express sanction of the president, it was decided that such sanction would be presumed, and that the sureties of the disbursing officer would be responsible for the money, although by statute, no money could be advanced to any disbursing officer without the especial direction of the president. The reasoning of the court is, that the sureties are bound for the faithful disbursement of public money coming into the hands of their principal; that the limitations upon the advances to disbursing officers are merely directory to the superior officers and form no part of the contract with the sureties, and that the government does not guarantee to the sureties the fidelity of such superior officers.²

¹ *Ross v. Hatch*, 5 Iowa, 149.

² *United States v. Cutter*, 2 Curtis C. C. 617, 629; *s. c.*, 4 Myers’ Fed. Dec., §§ 405, 406. See, also, *Wilcox v. Jackson*, 13 Pet. (38 U. S.) 498; *United States v. Kirkpatrick*, 9 Wheat. (22 U. S.) 720; *United States v. Vanzandt*, 11 Wheat. (24 U. S.) 184; *Smith v. United States*, 5 Pet. (30 U. S.) 292; *Dox v. Postmaster-General*, 1 Pet. (26 U. S.) 318.

§ 203. When sureties are liable for prior receipts of their principal. — Although the operation of an official bond be prospective only, and the sureties are not liable for prior defaults, they are liable for the continuance after the beginning of the operation of their bond, of a default existing before that time. Thus, the sureties of a receiver of public money, are liable for money which had been previously received by him and for which he had not accounted to the government. Such funds are presumed to be in his hands when he executed the bond, and the liability of the sureties attached at that moment. His previous failure to account and the neglect of his superior officers to compel an accounting before that time, constitute no defense to the sureties, for laches cannot be imputed to the government. The regulations requiring frequent settlements from such officers are merely directory and form no part of the contract. But if it be made to appear that in point of fact no such money was in the hands of the principal at the time of executing the bond nor ever had been, but that the liability grew out of false certificates of payments for public lands issued by the receiver acting in collusion with the purchasers before the execution of the bond, the sureties could not be held liable on a bond which was not distinctly retrospective in its terms. In other words, if the defalcation had occurred and the officer had become a debtor to the government before the execution of the bond, the sureties upon it could not be held liable.¹

§ 204. When the sureties of collector become liable. — It is necessary to charge the sureties on the bond of a collector of internal revenue, not only that he shall receive money in payment of taxes, but that all the formalities required

¹ *United States v. Boyd*, 15 Pet. (40 U. S.) 187, 209; *s. c.*, 5 How. (46 U. S.) 29, 51; *s. c.*, 4 Myers' Fed. Dec., §§ 409, 411, 412. See, also, *United States v. Kirkpatrick*, 9 Wheat. (22 U. S.) 720; *United States v. Vanzandt*, 11 Wheat. (24 U. S.) 184; *United States v. Nicholl*, 12 Wheat. (25 U. S.) 509.

by the statutes shall be complied with. Thus a collector who received money in payment of taxes on brandy, and gave no stamps in return, but merely as a temporary arrangement gave his receipt with the promise to furnish the stamps at a later day, did not charge his sureties by such receipt. The law explicitly requires, not the payment of the tax but the purchase of the stamps, and the liability of the surety does not accrue until the transaction is completed according to the forms prescribed by the statute.¹

§ 205. Cumulative bonds—Law on that subject. — In some of the states, as in North Carolina, officers whose terms of service extend over one year are required to give new bonds annually. It has been decided in that state that the statutes which require these new annual bonds of sheriffs, guardians, and other officers and trustees, do not operate to relieve the sureties on the previous bonds, but to provide additional security; that the bonds are not successive but cumulative; that the first bonds continue to be a security for the discharge of the duties as at first intended, and the new bonds became an additional security for the discharge of subsequent duties.²

§ 206. Construction of bond—Additional bond. — If retrospective words are used in the condition of a bond, full effect will be given to them. Thus, where a bond was given with the penalty of \$150,000 by a collector of customs, and eighteen or twenty months thereafter he gave another bond with the penalty of \$200,000, and still later, another bond with the same penalty, which last recited the former bonds and the necessity of further security, and was conditioned that if the principal “*has* truly and faithfully executed,

¹ United States *v.* Hermance, 15 Blatch. C. C. 6, 13; *s. c.*, Myers' Fed. Dec. 7., § 418.

² Poole *v.* Cox, 9 Ired. L. 65, 71; citing, Oats *v.* Bryan, 3 Dev. 451; Bell *v.* Jasper, 2 Ired. Eq. 597

etc., and shall truly and faithfully," etc., it was held that the sureties on the last bond were absolutely bound, and were responsible for any default of the principal, and that such liability was in no respect conditional or contingent.¹

§ 207. When an official bond becomes operative.— It is often a matter of importance to fix the time when an official bond becomes operative, as from that time the liability of its obligors commences. In general, the bond goes into effect as soon as the officer is inducted into office, or is otherwise enabled to perform the duties for which the bond was given. In reference to individuals, the bond becomes operative as soon as the interest of the person in question becomes in any degree dependent upon the good or bad conduct of the official. At that moment and to that degree, the sureties of the officer become responsible for that interest, that it shall suffer no detriment from the official misconduct of their principal. Thus, when an execution is placed in the hands of a sheriff, the interest of the plaintiff becomes at once dependent upon the conduct of the sheriff in the execution of the process, and at that moment the *fieri facias* attaches itself to the bond which becomes the security that everything legal and nothing illegal shall be done with reference to the process. Upon these principles it was held that when an execution was delivered on November 24th to a sheriff who gave a new bond on December 8th, and made default upon the execution at a later date, the remedy of the plaintiff in the execution was upon the bond which was in force on November 24th, and not upon the bond in force when the default was actually made.² This ruling, so far as the liability for the default is concerned, is clearly against the weight of authority, but it is nevertheless true that the liability of the obligors began when the writ was delivered to the sheriff;

¹ *United States v. Anderson*, 1 Blatchfd. C. C. 330.

² *Robey v. Turner*, 8 Gill & J. 125.

it ceased, however, when the new bond was given or was transferred to the obligors in that bond, no breach having been committed up to that time. It would be different, however, if there had been a levy while the first bond was in operation.

And in this connection, it has been held in a later case in Maryland, that under the law of that state the bond of a sheriff does not relate back to the time of its execution, but takes effect from its approval, that a sheriff is not authorized to act as such until after the approval of his bond, and that until he is legally constituted a sheriff his sureties are not liable for his acts.¹

§ 208. When bond is a condition precedent to official power or liability.—In Georgia, a county treasurer, is required (in common with many other officers) to execute a bond with security for the faithful discharge of his official duties. The due execution and delivery of such bond is held to be a condition precedent to the treasurer's lawful induction into the office, or discharge of its duties. Hence, when a statute authorizes the inferior court to issue an execution for a balance of public funds in the hands of such a treasurer, the execution is void as against junior judgment creditors, of the (so-called) treasurer, if they can show that he never executed and delivered the required bond. And this for the sufficient reason that the treasurer is no treasurer at all, and the execution was authorized to issue only against a *treasurer*.²

§ 209. Bond of person illegally appointed.—It is, of course, essential to the validity of an official bond, as such, that it shall be authorized by law and taken by an officer entitled to exact it. And where a justice who had no legal right to do so, appointed a person a constable, to fill a

¹ *Bruce v. State*, 11 Gill & J. 382.

² *Foster v. Justice, etc.*, 9 Ga. 185.

vacancy, and took a bond with security for the due performance of the duties of the office, the appointment and the bond were held to be both void. It does not appear, however, why the bond was not good as a common-law bond, nor why the constable was not a *de facto* officer as he held under color of an appointment, had the reputation of being the officer he assumed to be, and yet was not a good officer in point of law.¹

§ 210. Bond of *de facto* officer.—Liability on.—In most, if not all the states, it is essential that persons holding offices of a local character should be residents of the county or district in which they are expected to officiate. If, however, one who is not such a resident, and therefore, ineligible for an office should be elected or appointed, give bond and security, and enter upon the discharge of the office, his sureties are nevertheless responsible upon his bond, not certainly as a statutory but as a common-law bond. By it the officer was enabled to assume the official character and get into his hands the money of parties who had to do with his office, and this constitutes a sufficient consideration to uphold the bond.² This liability can assuredly be upheld on the ground that such an officer is at all events a *de facto* officer, and his sureties are liable for his acts as such.

§ 211. Object and effect of official bond.—The object of an official bond is to obtain indemnity against the misuse of an official position for wrong purposes, and that which is done under color of office, and which would obtain no credit except for its appearing to be a regular official act, is within the protection of the bond, and must be made good

¹ *Olds v. The State*, 6 Blkfd. (Ind.) 91; citing, *Wilson v. Hobday*, 4 Maule & S. 121; *Commonwealth v. Jackson*, 1 Leigh. 485; but see *Rex v. Corporation of Bedford Level*, 6 East, 356, 368.

² *Commonwealth v. Teal*, 14 B. Monr. 29.

by those who signed it. Thus, under the law of Michigan, money in the treasury of the county can be drawn, upon the warrant of the chairman of the board of supervisors, countersigned by the clerk, and in a case in which a warrant signed in blank by the chairman was filled up and countersigned by the clerk and money obtained upon it by him, the sureties of the clerk were held responsible. And the court said: "If the warrant in question was so suspicious on its face as to render the treasurer culpable for paying it, that does not lessen the fault of the clerk or render his act less official."¹

§ 212. What is an official act? — The sureties of officers are always bound for their official acts, and the question often arises, whether the act or omission complained of is an official act, or the omission of an official duty, as the case may be. Under the statute law of Mississippi, the clerk of a circuit court is required, upon the petition for a writ of error by a party to a suit decided in his court, and the execution of a prescribed bond with two good sureties, to issue such writ of error. In an action against a clerk for improperly issuing a writ of error under such circumstances, it was held that its issuance was a ministerial act, which the clerk was bound to perform, that he must take the bond, see to it that the sureties were sufficient, and issue the writ, and this being his official duty, his sureties were liable for its due performance. Whether the clerk was bound for the sufficiency of the sureties was a question which the court declined to decide in advance, as it was not raised by the pleadings in the cause, but intimated that the exercise of a reasonable degree of caution and discretion would exonerate him from liability, in case of mistaken judgment.²

¹ People *v.* Treadway, 17 Mich. 480.

² McNutt *v.* Livingstone, 6 Smed. & M. (15 Miss.) 641.

§ 213. Limitation of liability on sheriff's bond. — Although the duties of a sheriff, as a conservator of the peace, are not strictly judicial, they are of a public nature, and for neglect of them he is amenable to the public only, and punishable by indictment. No action will lie against him, on his official bond, for his failure to perform duties of this character; that remedy is confined exclusively to causes of action arising out of the performance or non-performance of his ministerial duties, and for these alone can any individual avail himself of an action on the sheriff's official bond. Hence, a suit could not be maintained against the sheriff and his sureties on his official bond, for the officer's alleged neglect to preserve the public peace, and protect the plaintiff against the violence of a mob who threatened and maltreated him.¹

§ 214. What is a common-law bond? — A bond that is not authorized or prescribed by any statute or other equivalent authority, is not a statutory or official bond, and must be treated and construed as a common-law bond. Therefore, the bond of a deputy treasurer, not being prescribed by any statute, should not be made payable to the state or to any official functionary, but to the person for whose benefit it is executed, and unless in its terms or effect contrary to law or to public policy, is valid as a common-law bond. It is perfectly competent for a treasurer to appoint a deputy, and to require and receive from him a bond, to secure the performance of his duties, and such deputy, in common with other obligors in other bonds, is estopped from averring anything in contradiction of the tenor and effect of his bond.²

§ 215. Official bonds of annually appointed officers — Limitations of liability of sureties. — It is a rule that the

¹ *South v. Maryland*, 18 How. (59 U. S.) 396, 403; citing, *Entick v. Carrington*, 19 State Trials, 1062.

² *Lucas v. Shepherd*, 16 Ind. 368.

sureties of an officer annually appointed are only liable for his official acts during the term for which he is appointed. In Missouri, the sheriff who, of course, gave a bond or bonds as such, was *ex-officio* tax-collector as well, and was required to give bond annually as tax-collector. It was decided that the bond of the sheriff as tax-collector falls within the principle which limits the responsibility of the sureties of officers annually appointed; and that the liability of the sureties on the sheriff's tax-collecting bond cannot be extended beyond the year for which the bond was executed, although the words of the condition be general and indefinite as to time; and that such words must be construed to relate to the time for which the office, recited in the condition, is limited to be holden.¹

§ 216. Directory statute — Vacating office. — A statute which, without more, requires an officer to execute and file his bond within a limited time after his election, is directory only, and his office is not vacated by his omission to file his bond within the prescribed period. Thus, a tax collector, who failed to file his bond within ten days after his election, but filed it within fourteen days, and took the prescribed oath, was entitled to his office. The court said that the county court erred in rescinding its approval of his bond, declaring his office vacant, and appointing another person in his place. "The matter of time," the court said, "was not essential to the validity of the bond, nor a condition precedent to the party's title to the office."²

§ 217. Retrospective and retroactive laws. — The measure of the liability of an officer and his sureties on his

¹ *Moss v. State*, 10 Mo. 338, 339; citing, *Hassell v. Long*, 3 Maule. & S. 363; *Liverpool, etc., v. Atkinson*, 6 East, 507; *Lord Arlington v. Merrick*, 3 Saund. 411.

² *States, etc., v. Churchill*, 41 Mo. 41; citing, *Rex v. Lexdile*, 1 Burr. 497; *People v. Holly*, 12 Wend. 481.

official bond is the bond itself, and the law relating to the subject as it stands at the time the bond is executed. That law enters into and becomes part of the contract; and if, as in Alabama,¹ that law provides for liability for the discharge of duties imposed by subsequent laws, those duties must be such as *are* imposed by law; for, although an officer may incur personal responsibility for acts not within the line of official duty, his sureties on his bond are not involved.² And a statute passed after the acts were performed by the officer, purporting to declare such acts to be official, cannot retroact to render them official, although the statute may purport to explain and declare antecedent law.³

§ 218. When an official bond is not retrospective — Test of the liability of sureties in successive bonds. — It is a well established rule that the operation of an official bond is not retrospective, unless it is expressly stated to be so. The manifest object of all such obligations is not indemnity for the past, but security in future transactions, and any liability for the past is exceptional, and must be made to appear by distinct evidence.

Unless, therefore, the retrospective operation of an official bond be fully established, it will be regarded as prospective only. The usual difficulty, however, in this matter, is not in determining the character of the bond as prospective or retrospective, but where there are successive bonds, in fixing the liability for a given transaction upon one or the other. And yet the rule is simple enough. It is not the receipt of the money by the principal, but his failure to perform his duty, that charges his sureties. Thus, the receipt of money during his first term by an officer who is

¹ Code of Ala. (1876) § 179.

² McKee v. Griffin, 66 Ala. 211; Coleman v. Ormond, 60 Ala. 328; Brewer v. King, 63 Ala. 511; Morrow v. Wood, 56 Ala. 1; Kelly v. Moore, 51 Ala. 364; Moore v. Madison County, 38 Ala. 670; McElhaney v. Gilleland, 30 Ala. 183.

³ McKee v. Griffin, 66 Ala. 211

re-appointed or re-elected, does not render the sureties on his first bond liable, but if, during the currency of that bond, he converts the money to his own use, or fails to pay it over when it becomes his official duty to do so, such conversion or such failure is a breach of his first bond for which its obligors are responsible. So the sureties on a second bond are liable for the proper disposition of all money officially in the hands of their principal when their bond is executed, in the retention and possession of which he has violated no duty and committed no breach of his first bond. In other and fewer words, it is the *breach* of the bond that creates and fixes the liability of sureties.¹

§ 219. Successive bonds — Sureties on second bond liable for money on hand when bond was executed — Burden of proof — Presumption. — When an officer is re-appointed and gives a new bond, he is presumed to have on hand all the money which his accounts show to be due to the government. Consequently, his sureties on his new bond become immediately liable for that amount, and if they allege that no such amount was then on hand, it is incumbent on them to show that the funds with which their principal then stood charged, had been converted by him during the currency of his first bond. They are not, of course, liable for the default of their principal, committed before the execution of their bond, but the *onus* is upon them to show that it was so committed, for every officer is presumed to have done his duty, until the contrary is proved; and as it is the duty of an officer to have on hand balances charged to him in his official accounts, he is presumed to have such funds in hand.²

§ 220. Successive sureties — Liability of — Construction of bond. — The sureties of an officer are liable only

¹ Commissioners *v.* McCormick, 4 Montana, 115.

² Bruce *v.* United States, 17 How. (58 U. S.) 437, 443; *s. c.*, 4 Myers' Fed. Dec., § 522.

for the money received by him during the term for which he was appointed, and covered by the bond to which they are parties, and are not responsible for misapplication of money received before or after that term.¹ It is equally true, however, that they are liable for taxes which their principal may have collected during that term upon assessment rolls received during a prior term, or for stamps or money on hand at the expiration of his previous term. He is equally liable for funds or property retained by him, as his own successor, as for such as he might have received from a predecessor. And it is competent for sureties on a second bond, who are charged, upon the evidence of treasury transcripts, with a deficit, to show that credits in a preceding settlement were obtained on payments of funds derived from the receipts of the subsequent term for which they were liable, and to relieve themselves by throwing the burden of their principal's defalcation upon the sureties on his previous bond. The amount charged against the principal by treasury transcripts is only *prima facie* evidence against the sureties, and they may show, if they can, by circumstances or otherwise, that they are not liable for it.²

§ 221. Successive sureties—Substitute bonds.—Officers are often required by statutes to give *new* bonds, and whether such bonds are supplemental, cumulative, and additional, or substitutes for the old bonds, is often a question of absorbing interest to the parties concerned in both. Of course, the question depends chiefly on the language of the statute itself. If it says that the new bond shall be given *instead* of the old, it is a substitute for the old bond and not a supplement to it, and in such case, and whenever by fair construction the meaning of the statute appears to be to furnish a substitute for the old bond, the sureties on

¹ United States *v.* Eckford, 1 How. (42 U. S.) 250.

² United States *v.* Stone, 16 Otto (106 U. S.), 525.

the old are not bound after the new bond has been duly executed.¹

§ 222. Successive sureties — Apportionment of payments. — The law controlling the apportionment or application of partial payments, is a matter of no little importance in cases in which there are successive sets of sureties whose interests conflict with each other. The general and well established rule on this subject is, that where there are several different accounts, the debtor has a right to apply such payments as he may make, to either of the accounts, at his election; if he omits to do so the creditor has a like option; if he is equally inactive, the law adjusts the several payments according to the justice and equity of the case. The rights of the debtor, in this respect, do not survive to his administrator, if the estate is insolvent, for in such case it is his duty to apply the assets of his intestate to the payment *pro rata* of his debts, and if the United States is a creditor, having, of course, a right to priority of payment, his duty is not changed by that priority. If the claim of the government consists of several distinct accounts, the payments made by the administrator must be apportioned *pro rata* among the different accounts of which the debt is composed. The law is further, that where there is a running account, and there has been no specific application of payments to specific items of the account, each payment must be applied as it is made to the discharge of the items previously due, in the order of time in which they stand in the account. This is all well settled law, but it may be questioned whether the rule can be applied where there are different sets of sureties to official bonds whose interests are involved, and there is a well marked period at which the liability of one set of sureties ends, and that of another begins. It has been held by the

¹ *United States v. Wardwell*, 5 Mason C. C. 82, 85.

supreme court of the United States,¹ that the rule adopted in ordinary cases is not applicable where the receiver is a public officer, not interested, who receives on account of the United States, where the payments are indiscriminately made, and where different sureties under distinct obligations are interested. The court says: "It will be generally admitted that monies arising, due, and collected subsequently to the execution of the second bond, cannot be applied to the discharge of the first bond without manifest injury to to the surety in the second bond, and *vice versa.*"

In a later case, a purser gave a bond in 1814, which was superseded by another bond in 1817, the latter by the express terms of the statute being "instead of," and a substitute for the former; the purser was found to be in default, at the execution of his second bond, about \$8,000, and when he died, in 1823, he was in default on his second bond for over \$29,000. The account kept in the treasury was a general account, no regard being paid to the currency of the respective official bonds. It was held (very erroneously), that under these circumstances the credits after 1817 were to be applied to extinguish the antecedent deficit, and that the sureties on the first bond were released by the credits given to the principal during the currency of the second bond, irrespective of the sources from which those credits were derived.²

This ruling is by Mr. Justice Story, and is, of course, entitled to the full measure of respect which appertains to everything which bears his name. It cannot, however, be believed to be sound law that, because of the mode in which

¹ *United States v. January*, 7 Cranch (11 U. S.), 575. See, also, *United States v. Nicoll*, 12 Wheat. (25 U. S.) 505; *Myers v. United States*, 1 McLean C. C. 493, 498.

² *United States v. Wardwell*, 5 Mason, C. C. 82, 87; 4 Myer's Fed. Dec., § 276; citing, *Clayton's Case*, 1 Meriv. 572, 604, 608; *Bodenham v. Purchas*, 2 Barn. & Ald. 89; *Simson v. Cooke*, 1 Bing. 452; *Simson v. Ingham*, 2 Barn. & Cr. 65. But see *contra*, *Myers v. United States*, 1 McLean C. C. 493, 498; *United States v. January*, 7 Cranch (11 U. S.), 575.

public accounts may be kept, the sureties of an officer who is a defaulter, at the expiration of his term, can be thus exonerated at the expense of a second set of sureties. The effect of the conjoint principles of law and book-keeping adopted in this case, is to make the officer a defaulter *ab initio* on his *second* bond, and his sureties on that bond liable before any breach of it had been committed. As soon as he received any money, after the execution of his second bond, the debit stood against him on his second bond; when he paid it out, however strictly in accordance with his duty, the credit for the payment relieved his deficit on his first bond *pro tanto*, and there being nothing to answer the debit on his second bond, he was in default on that bond without any failure of duty, and his sureties were liable, although there had been no breach of the bond. All this, it is believed, is equally inconsistent with law, equity, and common sense.

§ 223. Appropriation of payments—Statute of limitations.—The question as to the appropriation of payments usually arises where there are successive sets of sureties on official bonds, and must be considered with reference to their rights. It is settled that neither the non-feasance nor the misfeasance of the principal, nor any cause of responsibility occurring within the period for which one set of sureties have undertaken, can be transferred to the period for which alone another set have made themselves answerable.¹ There may be, however, another question depending upon different principles when the question of appropriation of payments arises between the creditor on the one side, and the officer and his single set of sureties on the other. In an action against a surety on a postmaster's official bond, the defense of the surety was in substance that there were successive deficits in the postmaster's quar-

¹ United States *v.* January, 7 Cranch (11 U. S.), 572; United States *v.* Eckford, 1 How. (42 U. S.) 250.

terly accounts running through a period of several years, and that he (the surety) was entitled to the benefit of the limitation of two years after the occurrence of the default as prescribed by the act of congress of March 3, 1825, which required suit to be instituted against sureties within two years after the default of their principal. On the other hand, it was insisted that each deficit was extinguished by the subsequent payments, so that no part of the default was within the operation of the act of congress invoked by the surety. This state of facts, of course brought up the question whether the creditor could appropriate the payments made during one quarter to the discharge of the debtor's deficit on the preceding quarter. The conclusion of the court, after a review of the English and Federal decisions, is: "The application of the moneys received in a subsequent quarter to the payment of the debt or balance antecedently due being perfectly correct and lawful, it follows that no part of the default for which suit is brought accrued two years before."¹

§ 224. Same subject continued. — As the case cited in the preceding section is based upon the ground that the appropriation was made at the periods at which the money was paid, it may be as well to look into the subject generally, as there is some diversity in the rulings. The principles governing the application of indefinite payments are borrowed from the civil law. By that law the leading rule is, that the option of appropriating payments is given first to the debtor, and in the second place to the creditor; and this rule is literally followed in England and America. According to the civil law the election must be made at the time of the payment, and this as well in the case of the debtor as of the creditor. If neither party applied the payment at the time it was made, the law applied it accord-

¹ *Jones v. United States*, 7 How. (48 U. S.) 681, 692.

ing to certain rules of presumption depending on the nature of the debts, or the priorities of time between them. Thus far there has been no controversy, but there is high authority in England for the doctrine that if the debtor made no appropriation of the funds at the time of the payment, the creditor might at any time thereafter apply them to any one or more of his demands against the debtor or any subdivision of his debt.¹ It was said in one case that the creditor must make his election within a reasonable time, but in another case that he might make it at any time before the case came under the consideration of a jury.² And the weight of the English authorities seems to be, although there is some variation in the rulings, that the creditor is not limited in point of time in making the appropriation, and that the rule of the civil law does not apply.

In the United States, Chief Justice Marshall says: "No principle is recollected which obliges the creditor to make this election immediately. After having made it, he is bound by it; but until he makes it he is free to credit either the bond or the simple contract."³ In a later case, Mr. Justice Story says: "It is certainly too late for either party to claim a right to make an appropriation after the controversy has arisen, and *a fortiori* at the time of the trial."⁴

The rule, therefore, seems to be both in England and the United States, as between debtor and creditor, that in case the former does not apply his payments to specific debts, the latter may do so certainly at any time before suit

¹ Goddard *v.* Cox, 2 Strange, 1194; Peters *v.* Anderson, 5 Taunt, 596; Meggott *v.* Mills, 1 Ld. Raymd. 287; Clayton's Case; Dovaynes *v.* Noble, 1 Meriv. 604; Simson *v.* Ingham; 2 Barnwell & Cr. 65, 75; Philpott *v.* Jones, 2 Ad. & Ellis, 41; Smith *v.* Wigley, 3 Moore & Scott, 174, 178; Mills *v.* Fowlkes, 5 Bing. New Cas. 455, 460.

² Philpot *v.* Jones, 2 Ad. & El. 41, 44.

³ Mayer, etc. *v.* Patten, 4 Cranch (8 U. S.), 320.

⁴ United States *v.* Kirkpatrick, 9 Wheat. (22 U. S.) 720, 737.

is brought. But it is equally true that the liability of sureties upon official bonds can neither be enlarged nor restricted by the action of the officers of the treasury, by their modes of keeping accounts, or any exercise of their discretion. Wherever there are successive sets of sureties of an officer for two succeeding terms, the liability of each set is the same as if a new person had been appointed for the second term, and no system of book-keeping will be permitted to throw upon one set of sureties the burden which properly appertains to the other.¹

§ 225. Liability of sureties when principal holds office "until his successor is elected," etc. — Whether the sureties of an officer elected for a fixed term, say one year, "and until his successor shall be elected," etc., are liable for his defaults committed after the expiration of his fixed term and before his successor is elected, is a question which has been decided both ways by very respectable courts. In Massachusetts it was held that the sureties of an officer who was to be "chosen annually" and "hold his office until another is chosen and qualified in his stead," are bound only for the year for which he was chosen, and for such further time as is reasonably sufficient for the election and qualification of his successor, and no longer.² This ruling has been followed by the courts of many other states.³ On the other hand it has been decided, not unreasonably, that the sureties of an officer who by the law was authorized and required to hold his office after his term expired until his

¹ *United States v. Eckford's Exrs.* 1 How. (42 U. S.) 250.

² *Chelmsford Co. v. Damarest*, 1 Gray, 1. See, also, *Bigelow v. Bridge*, 8 Mass. 275.

³ *Dover v. Twombly*, 42 N. H. 59; *Welch v. Seymour*, 28 Conn. 387; *Moss. v. State*, 10 Mo. 838; *State Treasurer v. Mann*, 34 Vt. 371; *Mayor, etc., v. Horn*, 2 Harr. (Del.) 190; *Insurance Co. v. Smith*, 2 Hill (S. C.), 590; *S. C. Society v. Johnson*, 1 McCord, 41; 10 Am. Dec. 644; *Committee, etc., v. Greenwood*, 1 Dess. (S. C.) 450; *County of Wappello v. Bingham*, 10 Iowa, 40; *Insurance Co. v. Clark*, 33 Barb. 196; *Patterson v. Inhabitants of Freehold*, 38 N. J. L. 255.

successor should be elected and qualified, were bound to know that his right to the office might under the law extend beyond the term of which he was elected, and that knowing this, they must have bound themselves for whatever time he might continue in office under his election. Especially was this regarded to be the case when it is considered that after the expiration of the term, the officer was not holding over without title, nor was he a usurper, nor a mere *de facto* officer, but a regular official holding the office after the expiration of the term, by virtue of the same election under which he held it during the term.¹ In the case of a cashier of a bank, Judge Dillon reviews the authorities on the subject and arrives at the conclusion that the true rule is as stated by Judge Shaw in *Chelmsford v. Demarest*, 7 Gray, 1, that the liability of the surety ceases within a "reasonable time" after the expiration of the term, such a time as would reasonably suffice for the election and qualification of the successor.² It may well be doubted, however, whether, when a statute explicitly declares that the officer shall hold his office for a specified term, and until his successor shall have been elected and qualified, and the bond fairly follows the terms of the statute, the obligation of the surety can be by judicial construction limited to the bare term, and a short time after its expiration. The object of the statute would be very imperfectly attained if for an indefinite period out-going officers could continue to discharge public duties and hold public property and money without any security at all, because the appointing and electing power neglects to act, or the elected successor delays his qualification. With a statute, or in some states a constitutional provision, in force

¹ *State ex rel. v. Berg*, 50 Ind. 496. See, also, *Thompson v. State*, 37 Miss 518; *Placer County v. Dickenson*, 45 Cal. 12; *State v. Daniel*, 6 Jones (N. C.), Law, 444.

² *Harris v. Babbitt*, 4 Dillon C. C. 185, 194; *s. c.*, 4 Myers' Fed. Dec., §§ 588, 589.

which extends the term of office until the election and qualification of the successor, it is not unreasonable to regard the statute or constitutional provision as entering into and forming part of the obligation of the surety, unless, indeed, the terms of the bond vary materially from those of the statute.

§ 226. Construction of bond — Liability for acts done under color of office. — Whether the sureties in an official bond are liable for the acts of their principal done under color of his office, or perhaps, more properly, how far and when they are so liable are questions on which the authorities are not fully in accord. When an officer falsely represented to a defendant that he had an execution in a case in which there was a judgment against the defendant on the docket of a justice, and upon that statement obtained money from him, it was held that the sureties of the officer were not bound for the money because the act of obtaining money upon the false pretense that he had executions which he had not, was not an act done under color of his office.¹ But where a constable seized goods under color of process which he had no legal right to execute, the sureties of the constable were held responsible; the court saying: “He, therefore, took the goods *colore officii*, and though he had no sufficient warrant for taking them, yet he is responsible to third persons, because such taking was a breach of his official duty.”² In that case the execution was for ninety dollars, whereas by the statutes of the state constables were not permitted to serve executions for larger sums than seventy dollars. In Indiana the rule is laid down that if the act done by the officer is performed under color of his office, the surety is responsible, and the court holds that in seizing the goods of a surety without having

¹ Commonwealth *v.* Cole, 7 B. Monr. 250.

² City of Lowell *v.* Parker, 10 Metc. 309, 314; 43 Am. Dec. 436; Gunnell *v.* Philips, 1 Mass. 530.

made proper exertions to get the money from the principal defendant, as he was required by statute to do, the officer was acting under color of his office and his sureties were liable.¹

§ 227. Rule as to collecting claims by ministerial officer.—In North Carolina an officer is not bound to receive claims for collection, but if he does so, he and his sureties are liable for the due performance of his duty as stipulated in his official bond, *i. e.*, “to endeavor diligently to collect them.” And the degree of diligence on his part for which his sureties are liable is that required by law of a collecting agent, that degree of vigilance, attention, and care which a faithful and prudent person conversant with business of that description would ordinarily use. It is not the duty of an officer, in all cases, to take out legal process. He may safely omit to do so when the claim is manifestly hopeless, and the process would involve a needless expense.²

¹ State *v.* Druly, 3 Ind. 431.

² State *v.* Holcombe, 2 Ired. L. 211; citing, Mathews *v.* Smith, 2 Dev. & B 287; McKinder *v.* Littlejohn, 1 Ired. L. 66.

CHAPTER VII.

BONDS—JOINT, OR JOINT AND SEVERAL—DIFFERENCES AND DISTINCTIONS.

SECTION 235. Bonds—Whether joint only, or joint and several, or several only.

236. Same subject continued.
237. When a bond is joint, or joint and several, or several only *quoad* the obligees.
238. Bonds joint only, or joint and several—Distinctions and differences in the remedies of the obligees.
239. When the heir is liable on a joint bond of his ancestor.
240. How joint bonds are regarded and treated in equity—Rule as to contribution of sureties.
241. The theory upon which relief is granted in equity against executors and heirs of deceased joint obligors.
242. Joint bond considered joint and several in equity—On what grounds.
243. Same subject continued.
244. When a joint bond will not be construed as joint and several.
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247. Equity will hold a joint bond to be joint and several in cases of actual mistake, even against a surety.
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249. Action on bond—Pleading must state accurately the character of the bond, whether joint, or joint and several.
250. Pleading—Parties to an action on a joint bond.
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252. Joint bond, not executed by principal, invalid.
253. Joint bonds—Discharge of estate of deceased surety—Joint judgment on joint and several bond, effect on, of death of surety.
254. Same subject continued.
255. Same subject continued.

§ 236 JOINT, OR JOINT AND SEVERAL BONDS. [CH. VII.

SECTION 256. Joint bond—Who is principal and who surety—Rule as to executors—Voluntary joint bond.

257. Partnership contracts are joint, but not embodied in bonds—Bonds executed by one partner.

258. Legislation on the subject of joint bonds.

§ 235. **Bonds whether joint only, or joint and several, or several only.**—Contracts generally and bonds as well as other forms of obligation may be joint, or several, or joint and several. The rules by which one of these classes may be distinguished from another may be thus stated: “If two, three or more bind themselves in an obligation thus, *obligamus nos*, and say no more, the obligation is and shall be taken to be joint only, and not several; but if it be thus, *obligamus nos et utrumque nostrum*” (or equivalent words in the vernacular), “the obligation is both joint and several.”¹ There may also be contracts even in the form of bonds or other specialties executed by several obligors to a single obligee in which the obligation is strictly several, each obligor being bound for his own proportion, or for a stipulated sum, irrespective of the liability of any other obligor.²

§ 236. **Same subject continued.**—Whether a bond be joint, or joint and several, or several only, must be determined primarily from its terms. If these are distinct and express, and leave no room for doubt, they must control the construction to be placed upon the instrument. If, however, the obligation be ambiguous and liable to different constructions the question must be settled by considerations of the interests of the obligors, and of course, of their intentions. And these interests, and consequent intentions, must be gathered from the language of the instrument construed in connection with the concomitant circumstances of the transaction. In

¹ Sheppard's Touchstone, 375.

² Moss v. Wilson, 40 Cal. 159.

several old cases it has been held that the interest controls the construction, no matter how positive the language of the instrument may be. "Wherever the interest of the parties is separate, the action may be several, notwithstanding the terms of the covenant on which it is founded may be joint; and where the interest is joint, the action must be joint, although the covenant in language purport to be joint and several."¹ The correct rule, however, is that stated by Mr. Preston in his note to Sheppard's Touchstone. "By express words clearly indicative of the intention, a covenant may be joint, or joint and several to or with the covenantors, or covenantees, notwithstanding the interests are several."² "So they may be several although the interests are joint."³

§ 237. When a bond is joint, or joint and several, or several only, quoad the obligees. — The rule may, therefore be stated to be, that a bond is joint, if its language distinctly and unmistakably shows it to be joint; or it may be joint and several if it so appears to be beyond a reasonable doubt. If, however, the terms of the instrument are ambiguous it must be classed according to the interests of its parties. The rule, however, is somewhat different with reference to the covenantees. Where there is an obligation to pay money or perform a duty to two or more obligees the character of the instrument as joint, or joint and several, depends upon the interest of the covenantees. Thus, where the obligation is to pay one sum of money, *in solido* to several obligees, the contract is joint and must be jointly enforced, no one of the beneficiaries can proceed separately for his share.⁴ But where there are a number of persons, each of

¹ James *v.* Emery, 5 Price (Exch. —), 553.

² Sheppard's Touchstone, 166; Robinson *v.* Walker, 1 Salk. 393.

³ Eccleston *v.* Clipsham, 1 Saund. 154, notes and cases cited.

⁴ Lane *v.* Dunkwater, 1 Crompt. M. & K. 613; May *v.* May, 1 Carr. & P. 44; English *v.* Blundell, 8 Carr. & P. 332; Osborne *v.* Harper, 5 East, 229.

whom is entitled to a separate specific sum, the case is different and each of the beneficiaries is entitled to his separate action for the amount due to him. Of this description is the usual composition deeds of debtors made with all their creditors. Each beneficiary may bring suit for his share.¹

§ 238. Bonds joint only, or joint and several—Distinctions and differences in the remedies of the obligee.—The liability of the obligors on a bond that is joint only, is in the absence of statutory modification strictly aggregate. The obligee must seek his remedy against all the obligors, and if one only be sued, it is a good ground for a plea in abatement that there are other obligors not sued, who are in full life and not outlawed. If this plea, however, is not interposed, judgment may be rendered upon the bond against the defendant in the suit, and the effect of that judgment is to discharge all the obligors who are not sued in the action, from all liability at law upon the bond, after the rendition of the judgment.² If one of the obligors be dead before the judgment is rendered, the legal remedy against him is lost, no action can be maintained against his heirs or executors, though the obligee may proceed against the surviving obligors. In such case a plea in abatement on the ground of the omission of the deceased obligor, or his representative is not admissible.³ And in this respect it is immaterial whether the deceased obligor be principal or surety, whether he is under any moral obligation to pay the debt or perform the duty stipulated in the bond or not; in either case, if the bond be joint, the remedy at law is lost as against the estate of the deceased obligor or his representatives.

¹ Lay v. Mottram, 19 C. B. (n. s.) 479, 485; Gresty v. Gibson, Law R. 1 Exch. 112.

² Higgans' Case, 6 Coke, 45; Lechmere v. Fletcher, 1 Crompt. & Mees. 628.

³ Towers v. Moore, 2 Vern. 99.

In case of a joint and several bond the obligee is at full liberty to select his victim and secure satisfaction from him if he can, without prejudice to subsequent legal proceedings against the other obligors, provided, of course, his first judgment fails to bring forth the desired fruits. And if one of the obligors of a joint and several bond shall die, the creditor may enforce his demand against the legal representatives of the deceased, although he may have previously obtained judgment against his co-obligor, provided that judgment has not been satisfied.

§ 239. When the heir is liable on a joint bond of his ancestor. — And where one of two joint obligors (both principals) dies, his heir at law cannot be held answerable at law upon the bond, unless he be sued as heir, unless he has promised to pay the debt, and unless it be averred in the declaration and proved upon the trial, that real estate had descended to him from his ancestor, sufficient in value to meet the demand. In other words the cause of action, upon which he can be charged at law, is not the bond at all, for that becomes merely a matter of inducement; but the new promise to pay, founded upon the pre-existing liability on the bond, and supported by the consideration of the lands which had descended to him from the deceased obligor.¹

§ 240. How joint bonds are regarded and treated in equity — Rule as to contribution of sureties. — The rule is different in equity; if all the obligors are principals, or if the deceased was a principal and under a moral obligation to pay the penalty or perform the condition of the bond, his representatives can be held in equity to perform the same obligation that could have been required of their testator or intestate if he still lived. If the deceased

¹ *Preston v. Preston*, 1 Harr. & Johns. 366.

obligor is only a surety, and the bond is joint only and not joint and several, he being under no moral obligation to pay its penalty or perform its condition, is bound only by the terms of his bond. This legal liability being extinguished by his death, equity will not interfere to charge his estate, nor enforce an extinct legal liability or a non-existent moral duty. And in this connection there is another principle involving the exemption of sureties in the case of the decease of one of their number. If the principal be insolvent and one of the sureties be compelled to pay the debt he cannot enforce contribution against the representative of his deceased co-surety. This is because his only right to contribution is by subrogation to the remedies of the creditor, and he has no right that the creditor could not enforce. As therefore the obligee of the joint bond could not charge the estate of the deceased surety, the surety who, by payment of the debt stands in the shoes of the obligee, cannot do so.¹

And if the legal remedy on the bond be extinguished, not by the death of one of two joint obligors, but by the inter-marriage of the obligor and obligee, it will nevertheless be held valid in equity. Thus, where, upon his marriage, the husband executed a bond to his intended wife for £2,000, conditioned to leave her at his death £1,000, and after his marriage mortgaged his estate and died, the court held that the bond, though released at law by the inter-marriage, would yet, in equity entitle the widow to redeem the real estate from the mortgage, and hold over for the satisfaction of the £1,000 stipulated in the condition.² And this is justified on the ground that as the consideration of the bond, the marriage, was a *good* consideration, the estate of the husband was charged with a trust which was not defeated by the legal extinction of the bond.

¹ *Walters v. Riley*, 2 Harr. & Gill, 805.

² *Acton v. Pierce*, 2 Vern. 480

§ 241. **The theory upon which relief is granted in equity against executors and heirs of deceased joint obligors.** — One theory upon which relief is granted in equity to the obligee of a joint bond against the executors and heirs of deceased obligors, being principals, or otherwise under moral obligation to pay the debt or perform the stipulated duty, there being no countervailing equity, is this: that although by the death of the obligor, the obligation and penalty have become void at law, the condition of the bond, taking it altogether, is regarded in a court of equity as “an agreement to pay the money, and an agreement under hand and seal.” And, therefore, Lord Hardwicke regarded the *condition* as obligatory as well against the heir as the executor.¹ This view of the matter is believed to be merely illusory, for if by the death of the obligor the remedy is gone on the bond and the penalty, because the bond is joint, how can it subsist in the condition which is a conditional defeasance of the antecedent obligation? The condition of a bond is not an agreement to pay money, it is only a statement of the terms upon which the prior agreement embodied in the bond proper, shall, or shall not become absolute. The truth is, that although it is undoubtedly the law that the executor and heir of a deceased principal obligor of a joint bond are liable for the debt or duty secured by it, it is because courts of equity have so held them to be, and not upon any principle derived from the character of their obligation. Courts of law for technical reasons, will not enforce these obligations, courts of equity will do so to compel the performance of a moral duty, and it is only in view of duties of that character that courts of equity have by a long series of rulings assumed the power of enforcing these among other imperfect obligations. That it is the moral obliga-

¹ Bishop *v.* Church, 2 Ves. sr. 100, 371; citing, Acton *v.* Pierce, 2 Vern. 840; Probart *v.* Clifford, 2 Atkins, 440; and other cases.

tion, and that only, upon which courts of equity base this jurisdiction is obvious, from the fact that they will not enforce a bond of this character against the representative of a surety. Whatever obligation there may be in the condition of a joint bond as an agreement "to pay the money and an agreement under hand and seal," as Lord Hardwicke expresses it, is equally binding upon the surety as upon the principal, and yet the court of chancery will enforce it against the latter but not against the former.

§ 242. Joint bonds considered joint and several in equity — On what grounds. — A much more reasonable source of equity jurisdiction, on the subject of joint bonds, is to be found in its undoubted and time-honored cognizance, of the subject of mistake. It is well settled that courts of equity will relieve in cases of mistake, not only when the mistake is expressly established, but when it can be fairly implied from the facts in the cause. And it may be remarked, that courts of equity are exceedingly liberal in so construing cases of hardship and injustice as to evolve from them such evidences of mistake as will authorize the relief which justice seems to require.

Where a contract is made for a joint loan it will be assumed in equity to have been a joint and several contract, whether the transaction be of a mercantile character, or not, and this although the form of the obligation be strictly joint. As equality of obligation can only be secured by making the contract several as well as joint, courts will conclude, from slender premises, or no premises at all, that a mistake had been made, and that from ignorance or want of skill in the scrivener, the bond had been made joint instead of joint and several. Thus, father and son, merchants and partners, owing a debt due by simple contract, gave as security therefor a joint bond. One of the obligors having died, the question of the liability of his representatives was

raised at once. The lord chancellor (Loughborough) held that the bond should be regarded as a joint and several bond, because it was shown to be the intention of the parties, that the bond was to be in the form usual with bonds executed by two persons; because none of the parties seemed to know the difference between a joint bond and a joint and several bond; and because a joint bond was no better security than a partnership promissory note.¹

§ 243. Same subject continued. — The solution of questions of this character depends greatly upon matters of presumed intention, and as already said, courts sometimes found their rulings upon very slender premises. In an American case, it was held that a surety could not be charged with liability upon any such presumption, and the court states, very accurately the presumptions which do apply to cases of this character. “In the first place, then, it is a fair presumption in the absence of all evidence to the contrary, that every man understands what he is doing, and that those obligors understood the long and well established difference between a joint, and a joint and several obligation. But this presumption may be rebutted by circumstances; and one circumstance, on which courts of equity have laid great stress, is that the money for which the bond was given was borrowed by, or came to the use of, both obligors. In such ease the very act of borrowing does, in itself, amount to a contract antecedent to their entering into a bond, that each and both should be bound to pay. When, therefore, the bond is afterwards so drawn as to constitute

¹ Thomas *v.* Frazer, 3 Ves. jr. 399, 402. See, also, on this subject generally, Thorpe *v.* Jackson, 2 Younge & Call Exch. 553; Wilkinson *v.* Henderson, 1 Mylne & K. 582; Richardson *v.* Horton, 6 Beav. 185; Weaver *v.* Shryock, 6 Serg. & R. 262; Ex parte Kendall, 17 Ves. 525; Ex parte Halkett, 19 Ves. 475; Burn *v.* Burn, 3 Ves. jr. 573; Ex parte Symonds, 1 Cox, 200; Simpson *v.* Vaughn, 2 Atkyns, 80; Ball *v.* Storie, 1 Sim. & Stu. 210; Card *v.* Jaffray, 2 Sch. & Lef. 374; Sumner *v.* Powell, 2 Meriv. 30; Gray *v.* Chiswell, 9 Ves. jr. 118, 125; Underhill *v.* Harwood, 10 Ves. jr. 218, 225, 227.

only a joint obligation, there is a reasonable presumption that either through fraud, ignorance, or inadvertence, the meaning of the parties has not been carried into effect. Such has been the reasoning of those judges who have decided on points of this kind; and it must be confessed that this is carrying the matter far enough in favor of the obligee.”¹

§ 244. When a joint bond will not be construed as joint and several. — Unless it be established that the true consideration of a joint bond was a joint original debt or liability, a court of equity will not regard or treat it as a joint and several obligation. And if the presumptions and inferences adequate to establish that fact be repelled, the court will not interfere in behalf of the obligee. In such case a mistake cannot be presumed. And it must be borne in mind that the mistakes against which equity will afford relief are, with few and questionable exceptions, mistakes of fact.² All the cases in which courts have sustained joint bonds against the representatives of a deceased obligor have turned upon supposed or assumed mistakes in drawing the bonds.² It has, however, been held that although a mistake in point of fact will be presumed in every case in which a joint obligation has been given, and a benefit received by the deceased obligor, no proof being required of actual mistake; yet the relief will not be granted unless there was equity antecedent to the obligation. “When,” says Sir William Grant, “the obligation exists only by virtue of the covenant, its extent can be measured only by the words in which it is conceived. * * * So where a joint bond has in equity been considered as several, there has been a credit previously given to the different persons who have entered

¹ *Weaver v. Shryock*, 6 Serg. & R. 262, 264.

² *Hunt v. Rousmanier*, 8 Wheat. (21 U. S.) 212, 213, 214; *Simpson v. Vaughn*, 2 Atkyns, 33; *Underhill v. Horwood*, 10 Ves. jr. 209, 227.

into the obligation. It is not the bond that first created the liability.”¹

§ 245. When joint and several bond will authorize only a joint remedy. — It has already been said that the very liberal presumptions indulged by courts of equity that bonds have been made joint by mistake will not be applied against sureties. To charge them there must be actual proof of an express agreement by them that the bond shall be several as well as joint.² And for the protection of sureties, courts of equity have gone still farther and held that when a joint and several bond has been given, and the obligee has elected to treat it as joint only, has taken a joint judgment on it, and ignored the several liabilities of its obligors, he will not be permitted as against the representatives of a deceased surety, to invoke the aid of a court of equity to enforce the several liability incurred by the deceased surety in the execution of the bond. And this upon the very plain principle, that the bond is merged in the judgment, that by electing to take a joint judgment only the obligee has extinguished forever the several liability of the deceased, and lost his right at law to a several remedy against the deceased surety. In a case of this kind the court (Mr. Justice Grier) says: “When an obligee takes a joint and several bond, he has nothing to ask of equity; his remedy is wholly at law. If he elects to take a joint judgment, he voluntarily repudiates the several contract, and is certainly in no better situation than if he had originally taken a joint security only; equity gives relief, not on the bond, for that is complete at law, but upon the moral obligation antecedent to the bond, when the creditor could have had no remedy at law.

¹ *Sumner v. Powell*, 2 Meriv. 35, 36; *Underhill v. Horwood*, 10 Ves. jr. 227; *Thorpe v. Jackson*, 2 Younge & Coll Exch. 553; *Ex parte Kendal*, 17 Ves. jr. 525; *Cowell v. Sykes*, 2 Russ. 191.

Weaver v. Shryock, 6 Serg. & R. 262.

An obligee who has a joint and several bond, and elects to treat it as joint, may sometimes act unwisely in so doing, but his want of prudence is no sufficient plea for the interposition of a chancellor. Nor can the conscience of a mere surety be affected, who having tendered to the obligee his choice of holding him jointly or severally liable, has been released at law by the exercise of such election.”¹

§ 246. Equity will not enlarge legal liability in cases of indemnity and other matters purely of convention.—Courts of equity will moreover refrain from enlarging the legal liabilities of obligors in joint bonds, where the obligations rests in mere convention, such as indemnity bonds and others in which the obligation exists only by the virtue of the covenant. In such case the extent of the liability is measured only by the words in which it is conceived. A partnership debt is treated in equity as the several debt of each of the partners, although the debt is at law joint, for the reason that all are presumed to have the benefit of the money advanced or the credit given. It is otherwise where a joint bond is given for indemnity against the acts of third persons, there being no antecedent liability in all or any of the covenantors to do that which by the bond they undertook to do.²

§ 247. Equity will hold a joint bond to be joint and several in cases of actual mistake, even against a surety.—The jurisdiction of courts of equity to relieve the obligees of

¹ United States *v.* Price, 9 How. (50 U. S.) 83, 951. See on this subject generally, Wright *v.* Russell, 3 Wils. 530; Waters *v.* Riley, 2 Har. & J. 310; Harrison *v.* Field, 2 Wash. (Va.) 136; Weaver *v.* Shryock, 6 Serg. & R. 262; Sheehy *v.* Mandeville, 6 Cranch (10 U. S.), 253; Higgins, Case, 6 Coke, 45; United States *v.* Cushman, 2 Sumner (C. C.), 426; Lechmere *v.* Fletcher, 1 Crompton & M. 623.

² Sumner *v.* Powell, 2 Meriv. 30, 35; Devaynes *v.* Noble (Sleech's Case), 1 Meriv. 568; Harrison *v.* Mirge, 2 Wash. (Va.) 136; Ward *v.* Webber, 1 Wash. (Va.) 274; Thomas *v.* Frazer, 8 Ves. jr. 399, 402; Burn *v.* Burn, 8 Ves. jr. 573, 582; Richardson *v.* Horton, 6 Beav. 186.

joint bonds on the ground of mistake, as already intimated, has been very extensively exercised in cases of assumed or presumed mistake, and this relief is limited to cases in which there is an antecedent equity, and never operates against sureties or guarantors. In most of these cases the *mistake* is merely presumptive, a fiction of law seized upon by the court to do justice and relieve hardship. In point of fact there is rarely any mistake whatever in cases of that character, and the pretense of mistake is not unlike the *lost and found* figment in the legal action of trover. When, however, there has been a real, actual mistake of fact, and in consequence thereof a bond has been made joint that should have been joint and several, courts of equity will relieve against the consequences of the mistake, and as fully against sureties and guarantors or other *quasi* innocent parties as against the principal obligor or other actual beneficiary. Thus, where a guardian's bond had been taken payable to the people, instead of the infant, the court promptly corrected the mistake and enforced the obligation, against the surety.¹ Lord Hardwicke says: "No doubt but this court has jurisdiction to relieve in respect of a plain mistake in contracts in writing as well as against frauds in contracts. There is, therefore, no reason upon principle why an actual mistake in the language of a bond will not be relieved against, although the party be a surety. It is the *mistake* that gives the jurisdiction, not the merits of the parties. The object of the court in all such cases and the effect of its decrees is not to do justice or relieve hardship, but to place the parties precisely where they intended to be, and would have been but for the mistake."²

§ 248. When a bond is joint and several and when joint only. — It is not the execution or delivery of the bond

¹ Wiser v. Blackly, 1 Johns. Ch. 607.

² Henkle v. Royal, etc., Co., 1 Ves. sr. 317.

that determines its character as joint or joint and several, but its terms, and especially the provision which it makes for its own satisfaction. Thus, in an old case, suit was brought against one of several obligors in a bond, his co-obligors being living, and it was argued that the bond was joint because in it the obligors bound themselves jointly, although later in the same instrument the words “*or* either of them” were used, the latter words it was contended were void for the uncertainty as to which of the obligors were so bound, the word “*or*” and not “*and*” being used. This transparent casuistry was summarily set aside by the court, who held that it still remained at the pleasure of the obligee to sue them jointly or severally, that the joint delivery of the bond did not make it a joint bond, it being by the law and according to its terms joint and several, and that in this connection “*et*” and “*vel*” were “all one.”¹

§ 249. Action on bond — Pleading must state accurately the character of the bond, whether joint, or joint and several. — It is a well established rule that a pleading is to be taken most strongly against the pleader. Hence, if in describing the bond sued upon, it is alleged in the declaration to be a joint bond executed by the defendant and another person, but without stating that the co-obligor is dead, the declaration is bad, the action cannot be supported, and the error is not cured by verdict. And this is true, although in point of fact the bond, a copy of which was annexed to the declaration, was a joint and several bond. It may be said, however, that if by craving over the bond had been spread upon the record, and it thereby appeared that the obligors were bound severally as well as jointly, the defect in the declaration would be obviated.²

¹ *Hankinson v. Sandilaus*, Croke Jac. 322.

² *Newman v. Graham*, 8 Munf. 187; *Meredith v. Duval*, 1 Munf. 76.

§ 250. Pleading — Parties to an action on a joint bond. — In an action on a joint bond all the obligors must be made defendants, otherwise a plea in abatement by the obligor who is sued that other parties were jointly bound with him will defeat the action. He cannot, however, crave *oyer* and demur, for if he does, the court will presume that the other alleged obligor did not seal the bond. The defect is strictly matter in abatement.¹

§ 251 Joint and several bond is not rendered several only by stipulations as to proportions of liability of obligors. — Sureties on official bonds sometimes seek to evade the force of the “we or either of us” clause in instruments of that character by appending to their names in the body of the instrument, or to their signatures the amount for which they intend or expect to be bound. It has been held in construing a prudential device of this character, that unless in framing the bond its *joint* characteristics are wholly eliminated, and it is made only a *several* undertaking, the precaution is wholly unavailing as against its obligee. He can enforce against any of the obligors the full amount of the aggregate penalties, and the intended limitation of liability only apportions the loss of the sureties *inter sese*. This, however, is the rule in the absence of any statute authorizing such limitation of liability.¹

§ 252. Joint bond not executed by principal, invalid. — A bond purporting to be that of a principal and his sureties joint in form, and only several in recited limitations of the liabilities of the sureties, is absolutely void if it is not executed by the principal. Being a joint bond, his signature was necessary to its validity, for the defects, which can be cured upon their suggestion in a complaint, do not embrace the absence of the signature of the principal obligor.

¹ Gilbert *v.* Bath, 1 Strange, 503.

² People *v.* Slocum, 1 Idaho, 62.

§ 254 JOINT, OR JOINT AND SEVERAL BONDS. [CH. VII.

Without his signature the instrument is not his deed. There is no bond of his in which defects can be suggested and cured.¹

§ 253. Joint bonds — Discharge of estate of deceased surety — Joint judgment on joint and several bond — Effect on, of death of surety. — It is a well settled principle that where a bond is joint only the estate of a surety is discharged by his death. This is not the case where the bond is joint and several, as heretofore stated, unless the obligee elects to treat it as a joint bond only by taking a joint judgment upon it. A surety is under no moral obligation to pay where he is not legally bound by his contract, hence, any moral obligation he may have incurred by executing a joint and several bond is discharged by the obligee's election to treat it as joint only, and his conscience therefore is no longer bound. The law makes a part of every contract, and in case of a joint and several bond, the contract is that the estate of the surety shall be discharged if the creditor shall elect to hold him jointly and not severally liable. That being the law, that is also the contract.²

§ 254. Same subject continued. — In a later case this whole subject was reconsidered by the supreme court of the United States, and all the authorities reviewed. It was there held that if one of two joint obligors dies, the debt is extinguished as against his representative; that the remedy at law being gone, as a general rule, a court of equity will not afford relief; that such a court will not vary the

¹ *People v. Hartley*, 21 Cal. 585, 589; citing, *Sacramento v. Dunlap*, 14 Cal. 423; *Bean v. Parker*, 17 Mass. 591; *Wood v. Washburn*, 2 Pick. 24; *Sharp v. United States*, 4 Watts, 21; 28 Am. Dec. 676; *Fletcher v. Austin*, 11 Vt. 447; 34 Am. Dec. 698; *Johnson v. Erskine*, 9 Texas, 1; *Cutter v. Whittemore*, 10 Mass. 442; *Adams v. Bean*, 12 Mass. 139; 7 Am. Dec. 44.

² *United States v. Price*, 9 How. (50 U. S.) 83, 108; *s. c.*, 4 Myers' Fed. Dec., § 542. See the dissenting opinion in this case and cases cited.

legal effect of the instrument so as to make it several as well as joint, unless it appears clearly that such was the intent of the parties, in which case, as well as in cases of fraud or accident, the court exercising its general powers over those subjects will reform the instrument so as to make it accord with the meaning of the parties; that this will be done where there is a previous equity, as where each of the obligors was indebted to the plaintiff, and this upon the ground of a moral obligation on the part of the deceased to pay his debts; that a mere surety incurs no moral obligation, he is bound only by the legal force of his bond, and consequently there is nothing on which to found an equity; that if a surety die before his principal, his legal representative cannot be sued at law or charged in equity.¹

§ 255. Same subject continued. — And the same principles apply as well when the bond in question is one which is given in pursuance of the requirements of the law and form a part of judicial proceedings. Thus, in an action upon a bond given under a New York statute, as a condition precedent to the issuance of an injunction, it was held that when a statute is silent as to whether the bond it requires shall be joint, or joint and several, a bond in either form is official and statutory. As it was within the discretion of the chancellor to direct the bond to be either joint, or joint and several, the party enjoined cannot fairly be said to have had no voice in the matter as he could have

¹ *Pickergill v. Lahens*, 15 Wall. (82 U. S.) 140, 146; *s. c.*, 4 Myers' Fed. Dec., § 550; citing, and following *United States v. Price*, 9 How. (50 U. S.) 88, 108; citing, also, *Simpson v. Field*, 2 Ch. Cas. 22; *Sumner v. Powell*, 2 Meriv. 30; *s. c.*, 1 Turn. & R. 423; *Weaver v. Shryock*, 6 Serg. & R. 262; *Hunt v. Rousmaniere*, 8 Wheat. (21 U. S.) 212; *s. c.*, 1 Pet. (26 U. S.) 16; *Harrison v. Field*, 2 Wash. (Va.) 136; *Kennedy v. Carpenter*, 2 Whart. 361; *Other v. Iveson*, 3 Drewry, 177; *Jones v. Beach*, 2 De Gex S. 886; *Wilmer v. Curry*, 2 De Gex & S. 347; *Waters v. Riley*, 2 Har. & Gill, 311; *Dorsey v. Dorsey*, 2 Har. & J. 480, note; *Bradley v. Burwell*, 3 Denio, 65; *Richardson v. Horton*, 6 Beav. 185; *Wilkinson v. Hendersen*, 1 Myl. & K. 582; *Rawstone v. Parr*, 3 Russ. 539.

invoked the discretion of the court and been heard on the subject. And equity never treats a joint obligation as joint and several, unless the (alleged) surety has participated in the consideration. And there is no principle of equity by which a contract of indemnity can be construed so as to charge an estate, and an engagement to pay money, to receive a contrary construction.¹

§ 256. Joint bond—Who is principal and who surety—Rule as to executors—Voluntary joint bond.—It is settled law that where two or more executors or administrators execute a joint bond, they are to be considered as standing in the relation to each other of principal and surety, each being considered principal as to his own acts, and surety as to the transactions of his companion.² And such a bond so executed by co-executors is valid and binding and operative to charge each obligor as the surety of the other, although its execution was wholly voluntary, the will expressly exempting the executors from the duty of giving any security at all. They might have given a separate bond, or (presumably) they might have acted without giving any bond at all. Having given the bond, however, the court held them bound by it, for where a court has the power to take a bond from a fiduciary the nature and the extent of the liability assumed by the parties is ascertained by the bond itself, and not by any mere order of court reciting the fact of its execution.³

¹ *Pickersgill v. Lahens*, 15 Wall. (82 U. S.) 140, 146; *s. c.*, 4 Myers' Fed. Dec., § 551.

² *Caskie v. Harrison*, 76 Va. 85; *s. c.*, 3 Am. Prob. Rep. 309, 316; *Morrow v. Peyton*, 8 Leigh, 54; *Boyd v. Boyd*, 3 Gratt. 112; *Cox v. Thomas*, 9 Gratt. 319; *Green v. Hansborough*, 2 Brock. C. C. 166; *Seddens v. Robertson*, 2 Brock. C. C. 402.

³ *Caskie v. Harrison*, 76 Va. 85; *s. c.*, 3 Am. Prob. Rep. 309, 317; *Cecil v. Early*, 10 Gratt. 188; *Franklin v. Depriest*, 13 Gratt. 257; *Wonalath v. Cominrs.* 15 Gratt. 157.

§ 257. **Partnership contracts.** — Are joint, but not embodied in bonds — Bonds executed by one partner. — The parties who most usually bind themselves jointly are partnerships, but their contracts are not usually expressed in bonds. The rule is that each partner is the agent of all the others for the transaction of ordinary business, but his authority does not include the affixing of the seals of his partners. If a partner signs the partnership name and affixes a seal it is *his* seal and not that of his partners respectively, or of the firm which, unless incorporated, could have no seal. In an old Ohio case of this character, the court says: “The obligation declared on was executed by one of three partners in the partnership name. Such instrument obliges only the person who signs and seals it — it is *his* act and deed and not that of his *co-partners*. * * * A case might exist where the individual seal of one of several obligors was used by each, which would be good against each, because when so used, *it is the seal of each*, but that is not this case.”¹

When therefore a partner without sufficient previous authority attempts to charge his co-partners by an instrument under seal signed in the partnership name, they are not bound by his act unless, indeed, they subsequently ratified it.² But although they may disavow his act, it is not competent for him to take advantage of his own illegal act to evade the responsibility which by it he has brought upon himself. Thus, where a partner executed for himself and his co-partners a bond and warrant of attorney, upon which judgment was rendered against both, he was not permitted to have the judgment set aside. The court said that the instrument in question, although joint in terms was nevertheless the bond of the partner who had executed it, and being void as to the co-partner was in effect the single bond

¹ *Button v. Hampson*, 1 Wright (Ohio), 93.

² See *ante*, Ch. V., § 158.

of its actual obligor, and suit might well be brought upon it against him.¹

It is unnecessary, however, to pursue this subject further, it is sufficiently treated in a preceding chapter, to which the reader is referred.²

§ 258. Legislation on the subject of joint bonds.—
The incongruities of joint bonds and the frequent occasions that occur to invoke the interposition of courts of equity to remedy the injustice which they produce, have induced many of the states to provide by statute a remedy for the inconveniences resulting from them. In 1818 it was enacted in Alabama “that every joint bond shall be deemed and construed to have the same effect in law as a joint and several bond, and it shall be lawful to sue out process and proceed to judgment against any one or more of the obligors.”³ And at a still earlier day it was enacted in Tennessee that the obligee of a bond might include in his action, with the surviving obligors, the representatives of a deceased obligor; that in all obligations the representatives of the deceased obligor shall be liable with the survivors; and finally, that all obligations and assignments, which at common law would have been joint, shall be held to be joint and several.⁴

There is similar legislation in other states, and in view of the complications which it manifestly averts and the mass of litigation which it prevents, it is not unreasonable to say that such legislation should be universal.

¹ *Green v. Beals*, 2 Caines, 254.

² Chap. V., §§ 158, 159, *et seq.*

³ *Whitsett v. Womack*, 8 Ala. 482; citing Clay’s Digest, 323, § 61.

⁴ *Claiborne v. Goodloe, Cooke* (Tenn.), 391. See, also, *Th. & Steg. Code. Tenn.*, §§ 2789, *et seq.*

CHAPTER VIII.

OFFICIAL BONDS OF WHICH THE UNITED STATES IS THE BENEFICIARY.

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282. Same subject continued.
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- SECTION 291. Successive bonds—Appropriation of payments—Rights of sureties.
292. Apportionment of payments—Statutes of limitations.
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300. When surety is liable for past defaults—When not liable.
301. Right of surety by subrogation to priority of payment.
302. Surety—Nature and extent of his obligation.
303. Liability of United States marshals for attaching the property of one person for the debt of another.

§ 265. Official bonds of which the United States government is the obligee or the beneficiary.—The United States of America have issued a vast number of negotiable bonds, representing in the aggregate a large sum of money, and these securities are very highly prized by their fortunate holders. The government is beyond a doubt the greatest *bond* debtor in the world. Other nations may owe as much or more money, but their liabilities are not so exclusively embodied in negotiable paper.

And while the government has so profusely issued its own obligations, it is also the beneficiary or obligee of a very great number of conditional or official bonds of its exceedingly numerous and diversified corps of office holders. In common with most other governments it is the policy of the United States to secure as far as practicable the due discharge of public duties, by requiring of its officers, bonds with sureties conditioned for the faithful performance of their duties. Other bonds of like character are required of

unofficial persons whose business as importers of foreign products bring them within the jurisdiction of collectors of customs, and still others, who as manufacturers, brewers, distillers, are subjected to the regulations of the internal revenue service. Taken altogether the number and variety of official bonds in which the United States is either directly the obligee, or indirectly the beneficiary is very great, and many legal questions have arisen between their obligors and the government. Some of these questions are properly federal questions, involving and dependent on the construction of the constitution of the United States and the various acts of congress relating to the different bonds prescribed by those statutes ; others are controlled by the rules of the common law, and their solution in no degree depends upon the fact that the federal government is one of the parties involved. To the consideration of these questions this chapter will be devoted.

§ 266. Limited character of the federal government — Does not affect its capacity to exact official bonds. — The fact that the United States government is one of limited powers, does not in any material degree circumscribe its capacity to require bonds from its officers, or any other persons who may have dealings with it. Of course, where a statute authorizes a bond to be exacted, there could be no question, but even where no such statute is in existence, and the exigencies of the public service require it, a bond may be taken by the superior officers of the government to secure the performance of duty by their subordinates, or from other persons, if necessary, to subserve or promote public interests. And this power is founded upon the general rights of any political sovereignty to perform whatever acts may be necessary, consistent with its official character, to fulfill the purposes of its existence. Upon this principle the supreme court of the United States decided that an officer who was not required by statute to execute a bond,

and whose functions were imperfectly defined by law, might nevertheless be required by the secretary of the treasury, to execute a bond and furnish satisfactory security for the discharge of his duties. The court says that the "United States being a body politic, may within the sphere of the constitutional powers confided to it, and through the instrumentality of the proper department to which those powers are confided, enter into contracts not prohibited by law and appropriate to the just exercise of those powers." Hence a bond voluntarily given to the United States, and not required by law is a valid instrument obligatory upon the parties in point of law, and the right to take such a bond is an incident to the duties belonging to the appropriate department. While this is very true, it is essential to the validity of such a bond that it should be voluntarily given, for if a bond which is not required of an officer by any statute, or one varying materially in the condition from that prescribed by the statute, be demanded by a superior officer from his subordinate upon peril of losing his office, it is extorted under color of office, without warrant of law, is illegal and absolutely void.¹

§ 267. Of whom bonds are required by the United States. — It would be tedious and unnecessary to enumerate in detail all the officers of the United States of whom bonds are required to secure either the due discharge of their duties, or all the different classes of unofficial persons whose business so far connects them with the government as to involve the public financial interest, and render expedient the exaction of bonds designed to protect those interests. It would be easier, so far as concerns strictly official bonds, to enumerate the officers who do *not* give bonds than those

¹ United States *v.* Tingey, 5 Pet. (30 U. S.) 115, 128; *s. c.* 4 Myers, Fed. Dec., §§ 183, 184, 191, 197, 200, 632. See, also, Dugan *v.* United States, 3 Wheat. (16 U. S.) 172.

who do. Political officers do not give bonds, nor judicial, nor military, nor naval officers, except those of the two latter classes as are entrusted with the charge and custody of public property or money, such as paymasters, quartermasters, commissaries, pursers, medical purveyors, and other like functionaries.¹

All ministerial officers of justice, clerks of federal courts, marshals, and other like officers are required to execute bonds.² All treasurers, assistant treasurers, and all other officers charged with the custody and disbursement of public money must also give bonds with security for the faithful discharge of their duties,³ and all such officers may be required by the secretary of the treasury to renew, strengthen, and increase their bonds if, in his judgment, the public interests require it.⁴

All officers charged with the collection of public money from any of the numerous sources from which the national income is derived, must give bonds with security, and so must those who keep that money and disburse it. Collectors of customs, naval officers (of customs), naval store-keepers, every one who, by virtue of his office and his connection with marine affairs, naval or merchant, may possibly become indebted to the government, must give a bond to secure the national treasury against loss.⁵ So all collectors of internal revenue, gaugers, store-keepers, and other officers connected with that service who may incur any liability to the government, must also furnish appropriate

¹ U. S. Rev. Stat., 191; *United States v. Kirkpatrick*, 9 Wheat. (22 U. S.) 720; *United States v. Van Zandt*, 11 Wheat. (24 U. S.) 184; *Dox v. Postmaster-General*, 1 Pet. (26 U. S.) 325; *United States v. Linn*, 15 Pet. (40 U. S.) 290.

² U. S. Rev. Stat., §§ 783, 794. See, also, *Gwyn v. Breedlove*, 2 How. (43 U. S.) 29; *Gwyn v. Barton*, 6 How. (47 U. S.) 7.

³ U. Rev. Stat., §§ 302, 3600.

⁴ U. S. Rev. Stat., § 3600.

⁵ U. S. Rev. Stat., §§ 2619, 1415.

bonds.¹ All postmasters must give bonds, and if any married woman shall be appointed postmaster, her bond shall be as binding upon her and her sureties, and she shall be liable for misconduct in office, as if she were *sole*.² And whenever any postmaster is required to give a new bond, all payments made by him after the execution of the new bond may, at the discretion of the postmaster-general, or the sixth auditor, be applied first to discharge any balance which may be due from said postmaster under his old bond.³ This, it will be observed, is a legislative solution, so far as concerns postmasters, of the question which frequently arises between the sureties upon the old bond and the new, when substitute bonds are executed.

§ 268. Same subject continued. — All registers and receivers of the several land offices of the United States are required to give bond and security for the faithful discharge of their duties,⁴ and so must the surveyor-general and deputy surveyors of public lands;⁵ and these bonds, in common with most other bonds given by federal officials, may be increased or renewed at the discretion of the president of the United States.⁶

It is unnecessary to pursue this line of detail further. Whosoever connected with the operation of the federal government in its details, not being a strictly political, judicial, military or naval officer, is required to give bond and security for the faithful discharge of his duties; especially if the receipt, custody, or disbursement of public money or property form any part, however inconsiderable, of the functions of his office.

¹ U. S. Rev. Stat., §§ 3143, 3156, 3153.

² U. S. Rev. Stat., § 3834.

³ U. S. Rev. Stat., § 3835 (Act of Congress, June 8, 1872).

⁴ U. S. Rev. Stat., § 2236.

⁵ U. S. Rev. Stat., §§ 2215, 2230.

⁶ U. S. Rev. Stat., § 2216.

§ 269. Unofficial persons from whom the United States government requires official bonds. — It has been said in a preceding chapter, that bonds may be considered as official in which either the obligor, or the obligee, or beneficiary is an official person, corporation or sovereignty. In this class, therefore, may be included the multitudinous obligations entered into by individuals with the United States, or any of its officers, connected with business or pecuniary transactions. Bonds of this character are required of persons connected with the merchant marine, such as bonds for the registry or enrollment of vessels, for coasting and fishing licenses,¹ and for procuring other and similar privileges. And importers of foreign merchandise must also give bonds, such as bonds for the delivery at a foreign port of goods imported and re-exported.² And frauds upon the internal revenue service are guarded against by the exaction of a variety of bonds from distillers, brewers, manufacturers of tobacco and other products liable to internal revenue taxes.³

§ 270. Execution of an official bond of which the United States is the obligee or beneficiary. — As, therefore, the federal government is the beneficiary in so many official bonds and of such a great variety, it is well to inquire whether there are any peculiar rules of law growing out of acts of congress, by which the execution of such bonds is controlled, or whether they are governed in this respect by the general law applicable to like instruments payable to less distinguished obligees, whether the law of the place where the contract is made controls the construction of the bond, what is the style of seal necessary, and whether

¹ U. S. Rev. Stat., §§ 4145, 4306, 4317, 4320, 4328.

² U. S. Rev. Stat., § 3048.

³ U. S. Rev. Stat., §§ 3260, 3336, 3355; *United States v. Hodson*, 10 Wall. 77 U. S.) 395; *United States v. Powell*, 14 Wall. (81 U. S.) 493.

there is any especial element distinguishing such a bond from other like obligations.

And first, as to the seal: At common law it is well known that a deed or other specialty was required to be sealed with wax or similar tenacious substance; and it is equally matter of common knowledge that in most of the states a scrawl has been substituted for the actual waxen seal. Upon the question arising whether a bond executed by an officer under the United States government in a state in which the scrawl is a lawful seal, was duly executed with a scrawl, it was held that in this respect the *lex loci* was wholly immaterial and had no application whatever, because the bond was, in contemplation of law, executed at the seat of government. It is an instrument executed under an act of congress, and must be construed with reference to that act. And although there is no act of congress which authorizes the use of a scrawl for a seal, the general legislation and usage of the states may be said to give, in this case, the common law to the federal government. And upon this ground, the scrawl is admissible, as a seal in the execution of official bonds taken under authority of an act of congress.¹ And in this respect it would seem that the scrawl would be quite as available as a seal if the instrument were executed in a state in which the actual seal of wax was still required, as in one which the latest modern improvements on the common law had been adopted.

§ 271. Delivery and acceptance of official bonds to the United States. — It is not only necessary to the validity of an official bond that it shall be signed and sealed, but that it shall be delivered by the obligor and accepted by the obligee. What constitutes a sufficient delivery has been

¹ *United States v. Stephenson*, 1 McLean (U. S. C. C.), 462, 466; *s. c.*, 4 Myers' Fed. Dec., §§ 230, 283. See, also, *Cox v. United States*, 6 Pet. (31 U. S.) 172, 204; *Duncan v. United States*, 7 Pet. (32 U. S.) 435, 452.

already considered,¹ and there is nothing in the nature of an official bond given to the United States, or to any person for the benefit of the United States, which distinguishes it in the matter of delivery from any other like bond executed and delivered to other persons. It is only essential in effect that in accordance with the intention of the obligor, the bond should pass out of his power or possession into that of the obligee or some other person to hold for him. The obligor is bound from the delivery, the obligee from the acceptance, actual or implied, for there may be an acceptance implied from the circumstances connected with the transaction. The person or official body by whom an official bond must be accepted is usually pointed out by the statute authorizing the bond. When no special form or mode of acceptance is prescribed, the acceptance must be proved by the facts and circumstances attendant upon the transaction. Reception and detention of a bond by the proper official creates a presumption of acceptance, unless an objection is made within a reasonable time; the presumption, however, is one of fact, and the acceptance or non-acceptance of the bond is a question for a jury.²

For further considerations on the subjects of delivery and acceptance of official bonds, reference is made to another chapter of this work in which the subject is fully treated.³

§ 272. Laches — Not chargeable against the government. — The royal prerogative of immunity against *laches* embodied in the old formula, *mullum tempus occurrit regi*, is in many respects operative in favor of the United States as well as other sovereignties. In fact, it may be said to exist in full force in every respect, except in those cases in which it has been mitigated by special statutes of limitation, fixing a period of time after which actions to

¹ *Ante*, Ch. I. § 15, *et seq.*; Ch. VI. § 166, *et seq.*

² *Postmaster-General v. Norvell, Gilpin*, 105.

³ Ch. VI. § 174, *et seq.*

enforce liabilities to the government cannot be maintained. Such statutes are just as well as beneficent, for the obvious reason that in the lapse of time the means of defense against old demands, very frequently become lost or unavailable. And there have been enacted numerous statutes limiting the period during which actions may be maintained on official bonds payable to the United States, or of which the government is the beneficiary. For example, an action cannot (saving the rights of persons under disabilities) be brought on a marshal's bond after the lapse of six years from the alleged breach.¹ Nor can suits for penalties or forfeiture under the laws of the United States be instituted except within five years after the penalty or forfeiture accrued.² Sureties of a postmaster are released from their liability on his official bond, if suit shall not be instituted upon the bond within three years after the close of his account.³ Similar statutes affecting other officers and their sureties have been enacted, and the government has in this respect foregone much of its sovereign prerogative rights. This subject, however, will be more fully considered in a later chapter.

In one respect, certainly, the government has not abated any of its rights. Its claims against principal or surety on an official bond are in no degree affected by the laches of the officers to whom the enforcement of the obligation is entrusted by law, for laches cannot be attributed to the government either directly, or through the medium of its officers. Unless mitigated by some statute of limitations the prerogatives of the sovereign are in full force.

The supreme court of the United States says: "The utmost vigilance would not save the public from the most serious losses, if the doctrine of laches can be applied to its

¹ U. S. Rev. Stat., § 786.

² U. S. Rev. Stat., § 1047.

³ U. S. Rev. Stat., § 3838.

transactions. It would in effect work a repeal of all its securities.' The rules which require settlements at short and stated periods are made in the interests of the government, for its own security and not for the benefit of sureties on official bonds. They are merely directory to the auditing officers and form no part of the contract with sureties.¹

§ 273. Cumulative official bonds. — It is very usual in the system of official bonds prescribed by the statutes of the United States, that supplemental or additional bonds with further penalties, like conditions, and new sureties are required of persons already in office. In such a case a question arises as to the character and construction of the new bond, between the sureties who are bound upon it, and those of the old bond. If an action is brought upon the first bond, its obligors cannot plead that the second bond operated as a merger or extinguishment of the first, because it was a security of no higher degree than the first. And the second bond, not being between the same parties, cannot be regarded as a satisfaction of the first, but a collateral or cumulative security. And, although the bond may have passed into judgment, the original security remains, unless followed by actual payment or satisfaction.²

Of course in all such cases the language of the statute requiring the additional bond will control its construction as a substitute, alternative, or cumulative security. As frequently prescribed by acts of Congress, the full penalty

Dox *v.* Postmaster-General, 1 Pet. (26 U. S.) 318; citing, United States *v.* Vanzandt, 11 Wheat. (24 U. S.) 184; United States *v.* Kirkpatrick, 9 Wheat. (22 U. S.) 720.

² United States *v.* Hoyt, 1 Blatchbd. C. C. 326; citing, Jackson *v.* Schaffer, 11 Johns. 513; Andrews *v.* Smith. 9 Wend. 53; Drake *v.* Mitchell, 3 East, 251; Holmes *v.* Bell, 3 Mann. & G. 213; Bell *v.* Banks, 3 Mann. & G. 258; Chipman *v.* Martin, 13 Johns. 240; Davis *v.* Anable, 2 Hill, 339; Day *v.* Leal, 14 Johns. 404. See, also, United States *v.* Anderson, 1 Blatchbd. 330; United States *v.* Van Zandt, 11 Wheat. (24 U. S.) 184.

of both bonds may be exacted if necessary to extinguish the liability of the official debtor.

Additional bonds, designed for the further security of the government, are frequently required of public officers. These are sometimes called strengthening bonds and of course do not operate to release the sureties to the original bond. Bonds of this character are authorized by several acts of congress.¹ It is also competent for the government to require in proper cases substitute bonds which take the place of the original bond, and of course discharge the sureties in such bonds from further liability. When, therefore, an officer is required by the proper department to execute a new bond, the question whether the new bond is a strengthening bond or a substitutive bond, is a question dependent upon the terms of the bond, if there exists such peculiarities in its language as will enable the court to decide, as matter of law, whether it is a substitute bond or a strengthening bond. In the absence of any such *data* for a judicial solution of the question, it was held by Mr. Justice Clifford to be a question of fact for a jury whether the bond belonged to one of these classes or the other.²

§ 274. The effect of a new or a substitute official bond. — A statute which requires public officers acting under bonds to give new or substitute security on or before a day stated in the act, does not release the existing sureties, nor *ipso facto* vacate the offices, unless so expressly declared in the statute. And, although the officers fail to comply with the law and furnish new sureties, their old bonds remain in full force, for laches cannot be imputed to the government, and its omission

¹ 18 Stat. at Large, 225; 17 Stat. at Large, 408.

² Chadwick v. United States, 3 Fed. Rep. 750. See, also, United States v. Haynes, 9 Ben. (C. C.) 22.

to remove the disobedient officers, in no degree tends to exonerate their sureties. And even if an act expressly requires that a defaulting officer be recalled at the expiration of six months from the time of his default, his sureties are not discharged but remain liable until he is actually recalled.¹

§ 275. Construction of official bonds given to the United States.—In the construction of official bonds given to the United States there is very little to distinguish them from like instruments executed under other circumstances. It has been argued that as the United States was a sovereignty of limited and defined powers, and its officers and agents act in taking such bonds under a special authority delegated to them in precise terms by the United States, such agents are confined in matters of substance at least to the terms and limits of their authority ; and if they deviated in any material degree from the course prescribed by that authority, and exacted a bond with conditions unwarranted by their powers, not only was the bond void as to those conditions, but void altogether. In other words, the agents of the government should be held to the strictest construction of their powers in taking official bonds, and the nullity of such bonds should be the consequence of any deviation from the strict and precise execution of their powers.

The courts, however, at an early day held that these views were unwarranted by the law, or proper views of the nature of the government, which could not be carried on at all under such strict conditions. And where a bond is irregular or defective, it should be construed so that as much of it as was good should stand, and that only which was bad should perish. The court said that the true rule

¹ *United States v. Nichol*, 12 Wheat. (25 U. S.) 505; *United States v. Kirkpatrick*, 9 Wheat. (21 U. S.) 720; *United States v. Van Zandt*, 11 Wheat. (24 U. S.) 184.

was, that if at common law a bond be taken with a condition in part good, and in part bad, a recovery may be had upon it for a breach of that part of it which is good. And if under a statute a bond be taken with a condition which is in part prescribed by the statute, and in part not prescribed, the partial validity of the bond will depend upon whether the two parts of the condition are easily divisible and can be separated from each other. If they can, the bond is valid for as much of it as is in conformity to the law. If, however, it is not separable, or if it be made to the wrong person, the whole bond is void. And if a statute authorizes a bond to be taken in a prescribed manner, or for certain expressed purposes, and declares that if not so taken the bond shall be invalid, then of course it is void if it varies from the prescribed standard; or, in other words, if the statute is mandatory it must be strictly followed, if it is directory, a substantial compliance is all that is required, and a partial compliance may be available *pro tanto*. A retrospective clause in a bond which is not authorized by the statute is in any event void, and will suffice to vitiate it if it has been executed under a mandatory statute.¹

§ 276. Retrospective clauses in official bonds—Bond of United States collectors of customs and postmasters.— The rule that a retrospective clause in an official bond is void, is not without exception. In the act of congress of March 2, 1799,² it is provided that every collector of customs shall give bond within three months after he enters upon the execution of his office, and the statute furnishes the form of the bond. The condition of the bond applies

¹ *United States v. Brown*, Gilpin, 155. See, also, *Purple v. Purple*, 5 Pick. 226; *Johnson v. Meriwether*, 3 Call, 523; *Newman v. Newman*, 4 Maule & S. 70; *Warner v. Racey*, 20 Johns. 74; *United States v. Sawyer*, 1 Gallison, 99; *Piggott's Case*, 11 Coke, 27; *Norton v. Semmes*, Hob. 13; *Morse v. Hodsdon*, 5 Mass. 314; *Clapp v. Guild*, 8 Mass. 153; *United States v. Howell*, 4 Wash. 620; *Lee v. Coleshill*, Croke Eliz. 529.

² 1 Stat. at Large, 705.

as well to the past as the future acts of the collector.¹ A later statute, that of June 4, 1844, provides that every collector shall execute his bond *before* he is inducted into office, and of course neither the statute nor any bond executed in pursuance of it, would make any provision for liability for antecedent acts. It was held by Mr. Justice Field that both the old and new statutes were in force, that there was not such a repugnancy between them that the former was wholly superseded by the latter. Under the act of 1844, it was the duty of the collector to execute his bond before he went into office; if he failed to do so, and executed it after that time, his sureties were bound for his acts between his entering upon his office and the execution of his bond, under and by virtue of the act of 1799. To this extent, and by virtue of that statute, the operation of the collector's bond was distinctly retrospective. It need hardly be added that an official bond is of course retrospective whenever it is made so by the express terms or reasonable construction of the statute by which it is authorized.

The collector, however, besides his duties prescribed by the act of congress of 1799, was made a depositary of public money by the act of 1846, and that act so far as it relates to the official bond, contemplates security against future responsibility, not indemnity for past transactions. Consequently, the bond of the collector given in his capacity of depositary of public money could have no retrospective operation and if so framed was void as to such retrospective features. Where a statutory bond goes beyond the requirements of the statute it is, for the excess, without obligatory force.

And, it was held in the same case, that if an officer of this character has given bond, and acts under an appointment made by the president of the United States during the recess of congress, and afterwards, accepts a regular

¹ 5 Stat. at Large, 661.

appointment for four years, having been duly confirmed by the senate, his new appointment operates as a surrender of the old.¹ Consequently, the sureties on his old bonds as collector and as depositary of public money and fiscal agent, are in no degree bound by, or responsible for, his acts done after he accepted his new appointment.²

Where the condition of the bond of a postmaster is that he shall execute the duties of his office according to law, and the instructions of the postmaster-general, the obligation includes subsequent laws as well as those in force when the bond was executed; and the same rule applies as well to the orders of the postmaster-general as to the statutes. The obligation of the postmaster endures through his term of office, and public interests imperatively demand that new laws and new orders must be obeyed, as otherwise no uniformity could be maintained, and the affairs of the postal service would be thrown into confusion and disorder. Hence, sureties of a postmaster are responsible for his obedience to all laws enacted, and all orders issued, germane to his duties up to the very last day of his term.³

§ 277. Extraneous matter cannot be included in an official bond. — It is, of course, perfectly competent for the proper officers of the United States to take from other officers, security for debts due by the latter to the United States, and obligations of that character will be duly enforced. Such security cannot, however, be incorporated in the official bond of the indebted officer. Such a bond must be taken in conformity with the requisitions of the statute and is void so far as it exceeds those requisitions. If, therefore, the official bond of a collector of public

¹ *United States v. Ellis*, 4 Sawy. C. C. 590, 592; *United States v. Kirkpatrick* 9 Wheat. (22 U. S.) 720.

² *United States v. Ellis*, 4 Sawy. C. C. 590, 592.

³ *Boddy v. United States*, 1 Woodb. & M. C. C. 150, 171; *s. c.* 4 Myers' Fed. Dec. § 433.

money be made to include the pre-existing indebtedness of the collector to the United States, or any other extraneous matter (the bond being by the terms of the statute prospective only), the bond so taken is void as to the extraneous matter, whether it be the antecedent official liability of the officer to the government, as collector, or any other liability whatever.¹

§ 278. Common law bonds executed to the United States are valid. — It has already been sufficiently shown that, although the government of the United States is one of limited powers, it can, nevertheless, enter into contracts, and exact and receive bonds and other obligations without the sanction of an express statute, provided the exigencies of the public service and the interest of the government require it. Upon the same principle the bond executed by an officer whose appointment is irregular and unlawful is, nevertheless, valid and obligatory upon him and his sureties, provided the bond is executed for a lawful purpose. Although such a bond is void as a statutory obligation, it is a valid contract on the part of the principal who thereby undertakes to perform the duties recited in the instrument, and is binding upon his sureties, who guarantee that he shall do so. Every contract which contributes to the performance of a duty may be rightfully made. And the irregularity of an officer's appointment to office does not in any degree absolve him from the moral and legal obligation to account for public money which came into his hands by reason of such appointment.²

§ 279. The right of the United States to priority of payment by its debtors. — Closely connected with the subject of official bonds given to the United States, or for its benefit, is the priority of payment to which the government

¹ *Armstrong v. United States*, 1 Pet. C. C. 46.

² *United States v. Maurice*, 2 Brock. C. C. 96.

is entitled under several acts of congress. These acts provide in effect that whenever any person indebted to the United States is insolvent, or, in case he is dead, his estate is insolvent, the debts due to the United States shall first be satisfied, that the priority declared by the act shall extend to cases in which the debtor makes a voluntary assignment of his property, or absconds, or conceals himself, or commits an act of bankruptcy, and subrogates to that priority the surety of any insolvent principal in a bond given to the United States, provided such surety has paid the debt.¹

By another section of the same act the executor or assignee of such insolvent debtor who pays any debt to any other person out of the estate of such insolvent debtor before the debt due to the United States shall be satisfied, shall become personally liable for such debt due to the United States, or so much thereof as may remain due and unpaid.²

§ 280. Construction of priority statutes. — The construction of these statutes has been the subject of numerous decisions by the supreme court of the United States. The first of these, in 1805, eight years after the enactment of the law, disposed of several questions involving clauses of the original act which have been eliminated in the revision of 1873-74-75, and which, therefore, need receive no further attention. It was then held that the United States, as holders of a protested bill of exchange, which had been negotiated in the ordinary course of trade, were entitled to be preferred to the general creditors, where the debtor becomes bankrupt. In the course of his opinion Chief Justice Marshall says: "On this subject it is to be remarked that no lien is created by this law. No *bona fide* transfer of property in the ordinary course of business is overreached. It is only a priority in payment which under different modi-

¹ U. S. Rev. Stat., §§ 3466, 3468.

² U. S. Rev. Stat., § 3477.

fications is a regulation in common use ; and this priority is limited to a particular state of things where the debtor is living ; though it takes effect generally if he be dead.” He adds, however, with reference to the liability of an executor, that the priority, or a payment disregarding it, does not create a *devastavit*, and would require notice to bind the executor, administrator, or assignee. This last *dictum*, however, is avowedly *obiter* and individual.¹

§ 281. Same subject continued.—In the next case in point of time the court reiterates its ruling that the priority of the United States is not a lien upon the property of its debtor, and does not attach until there has been a voluntary assignment of all his property for the benefit of his creditors, or some similar contrivance to avoid the operation of the law. Consequently, it was held that the mortgage of the principal in an official bond, of part of his property to indemnify his surety against his liability on that bond, and also to secure him against his responsibility for existing and future indorsements, was valid as against the priority statute.²

In a subsequent case the insolvency upon which the priority of payment of the United States attaches, is defined to be such insolvency as is specified by congress. “ Insolvency must be understood to mean a legal and known insolvency manifested by some notorious act of the debtor pursuant to law; not a vague allegation, which in adjusting conflicting claims of the United States and individuals against debtors it would be difficult to ascertain.”³

It must be borne in mind that the priority of payment secured by the statute to the United States does not attach in case of an assignment of his property by the debtor, unless the assignment includes *all* his property. If he

¹ *United States v. Fisher*, 2 Cranch (6 U. S.), 358.

² *United States v. Hooe*, 3 Cranch (7 U. S.), 73.

³ *Prince v. Bartlett*, 8 Cranch (12 U. S.), 431, 434.

retains any substantial portion of his estate (not a mere *simulacrum* of property to evade the law), and his assignment is otherwise valid and in good faith, it will suffice to defeat the government priority. And as the government in claiming its priority must needs assert that the assignment includes *all* the property of the debtor, the *onus probandi* rests upon it.¹

This whole subject was reviewed in 1828, in a very elaborate opinion by Mr. Justice Story. His rulings are as follows: That the insolvency contemplated by the statute, and upon which the priority of the United States attaches, is a total privation of the debtor, of all his property. It supposes that *all* his estate has passed from him; that if any (material) property remains in the hand of the debtor, he is not insolvent in the sense of the statute, and no priority of payment accrues to the United States; that mere inability to pay all his debts is not the insolvency of the debtor within the meaning of the statute, and the right of priority of payment does not accrue from such inability; that the priority of the United States is not a right to elect what portion of the debtor's estate shall be devoted to the payment of his debt to the government, but a mere right of prior payment out of the general funds of the debtor in the hands of the assignee, it does not supersede the assignment of the debtor as to any specific property, but creates a general charge upon all the property assigned; that a mortgage is not only a lien upon land for a debt, it is more, it is a transfer of the property itself as a security for the debt; that it has never been decided by the Supreme Court that the priority of the United States will divest a specific lien; that it was not so decided in the case of *Thelluson v. Smith* (2 Wheat. (15 U. S.) 396), which turned on its own circumstances; that the lien of a judgment on land is a right to levy on it to the exclusion of adverse interests

¹ *United States v. Howland*, 4 Wheat. (17 U. S.) 108, 117.

arising after the judgment; that when the levy is made it relates back to the judgment.¹

§ 282. Same subject continued. — It is manifest that the priority of the United States can in no event attach to the property of any other person than the debtor of the government. Hence, the United States being the creditor of an insolvent member of a partnership, also insolvent, can have no right of priority as such creditor *quoad* the property of the partnership. It is well settled law that the interest of a partner in the partnership estate is his share of the surplus of that estate after the partnership's debts have been paid. Consequently, if the partnership is insolvent, the partner who is the government debtor has no interest whatever in the assets of the partnership which his creditor can possibly subject.²

§ 283. What liens are superior to the priority of payment in favor of the United States. — In the older cases construing the priority statutes, it has been *negatively* held that a lien existing when the event occurs which gives a priority of payment to the United States is superior to that priority. The courts say that it has never been decided by the supreme court that the priority will override a specific lien.³ In a later case, it has been affirmatively held that the priority of payment accruing to the United States under the statute, will be postponed to a lien which is specific as to the property affected by it, but general and indefinite as to the debts which it protects. The charter of a bank gave that institution a lien upon the stock of any

¹ Conard *v.* Atlantic, etc., Co., 1 Pet. (26 U. S.) 386, 438, 439, 441.

² United States *v.* Hack, 8 Pet. (33 U. S.) 271, 276; citing, Matter of Smith, 16 Johns. 103, 106; Moody *v.* Payne, 2 Johns. Ch. 548; Nicoll *v.* Mumford, 4 Johns. Ch. 522, 530.

³ Conrad *v.* Atlantic, etc., Co., 1 Pet. (26 U. S.) 386, 438, 439, 441; overruling in effect, Thelluson *v.* Smith, 2 Wheat. (15 U. S.) 396.

stockholder for payment of any note which he may owe to the bank after it shall have been protested, and permitted the bank to prevent any transfer of the stock until all indebtedness by the stockholder to the bank had been fully paid. Upon these facts although the lien of the bank was not in terms perfected until the note was protested, the bank had a right to refuse permission to transfer the stock before the note was protested and its lien consummated, and the lien so perfected was superior to the priority of the United States which would otherwise have accrued between the execution of the note and its maturity. "Every stockholder," says the court, "who draws or indorses a note to procure a loan from the bank, is bound to know the terms of the charter and by-laws; his signature to the note is an inchoate pledge of his stock for security; his stock gives credit to his name, and the bank grants the loan on its faith." This "inchoate pledge" the bank can sustain and keep alive until it has been perfected, and to that end may avail itself of every power vested in it by its charter and by-laws enacted in pursuance of it, against all creditors of the stockholders the United States included.¹

§ 284. Priority of payment further considered — Corporations. — In a later case the supreme court declares the following principles as fully settled by the statute and the rulings of the court construing it: first, that no lien is created by the statute; second, that the priority it creates cannot attach while the debtor continues the owner of the property and in possession of it, and this although he may

¹ *Brent v. Bank of Washington*, 10 Pet. (35 U. S.) 596, 610, 615; citing, *Conrad v. Atlantic, etc., Co.*, 1 Pet. (26 U. S.) 429; *Conrad v. Nicholl*, 4 Pet. (29 U. S.) 291; *Conrad v. Pacific, etc., Co.*, 6 Pet. (31 U. S.) 262, 279; *United States v. Mitchell*, 9 Pet. 743; 2 Coke Inst. 573; *The King v. Cotton*, 2 Ves. jr. 296. In the last two cases it is said to be a principle of the common law that though the law may give the king a better or more convenient remedy, he has no better right in court than the subject through whom the property claimed, comes to his hands.

be unable to pay his debts; third, that the insolvency of the debtor can only be established by proof that he has been divested of his property in one of the modes indicated in the statute; and fourth, that when he has been so divested, the person who is thereby invested with the title, becomes a trustee for the United States and is bound to pay their debt.

It is further held that all debtors of the United States, of whatever description or character, or in whatever manner they may have become bound, are included within the terms of the statute under consideration; that those who claim exemption from the operation of the statute are bound to prove that they are entitled to such exemption; and that corporations are *persons* within the terms of the statute and are included in its provisions, and if they become debtors to the United States, and such circumstances supervene as bring them within the purview of the statute, they are as fully subject as natural persons to all the consequences of such liability.¹

§ 285. Priority of payment—Not affected by the bankrupt law.—While the late bankrupt law was in force the question arose whether or not the priority of payment of the United States under the act of 1797² was superseded or in any degree affected by the bankrupt act. It was held in 1875 that the preference of the United States as a creditor of a partnership which was bankrupt applied to the separate and individual estates of the bankrupt partners, “thus superseding the rule in equity recognized by the bankrupt act,—that partnership property must first be applied to partnership debts, and individual property to the

¹ Beaston *v.* Farmer's Bank, etc., 12 Pet. (37 U. S.) 102, 133; citing most of the cases cited in the preceding sections, and in addition: United States *v.* State Bank of N. C., 6 Pet. (31 U. S.) 29; United States *v.* Amedy 11 Wheat. (24 U. S.) 392; Hunter *v.* United States, 5 Pet. (30 U. S.) 173.

² U. S. Rev. Stat., § 3466.

payment of individual debts.” The provisions of the bankrupt act in this respect do not apply to the United States, and the relations of the parties to the United States are precisely the same that they would have been had the partners been individually the debtors of the United States, and if the partnership had never been formed. As a consequence of this last proposition, it may be added that it was in no degree incumbent upon the United States to prove its claim against the partnership in the bankruptcy proceeding against it.¹

§ 286. Who are the debtors to whose liabilities the priority of the United States applies. — It is wholly immaterial what is the form of indebtedness by which a party becomes bound to the United States. Their priority of payment attaches to each and every variety of obligation. It is only necessary that the party shall be bound to pay money to the United States. When that has been established, the right to be paid, *first* of all, out of the estate of the debtor accrues to the government at once. Thus, where a banker by his own fraud and that of a disbursing officer, came into possession of the money of the United States, and soon after became (technically) insolvent, it was held that the banker was the debtor of the government to the amount so fraudulently received, that *assumpsit* would lie against him, and that the United States were entitled to priority of payment.²

§ 287. Demands of the United States against insolvent national banks are not entitled to priority of payment. — In the cases cited in the foregoing sections, the supreme court of the United States seemed to have exhausted the subject of priority of payments and settled the construction

¹ Lewis *v.* United States, 2 Otto (92 U. S.), 618.

² Bayne *v.* United States, 3 Otto (93 U. S.), 642; citing, Lewis *v.* United States, 2 Otto (92 U. S.), 618.

of the statute in question. Only one more ruling remains to be noticed. Under the general banking law now in force certain national banks may be designated as depositories of public money, and the secretary of the treasury is authorized to exact from them such security for the government deposits as in his judgment and discretion may appear reasonable and necessary. Having taken such security, and the bank having proved insolvent, the government is limited to the security so taken, and if that shall prove insufficient, stands, as to the deficit, in the same position as any other creditor, and has no priority of payment secured to it by the statute. In framing the general banking law, congress has regarded the *carte blanche* it gave to the secretary of the treasury to exact security for government deposits, a sufficient concession to the rights of the sovereign, and so framed the law as in the opinion of the Supreme Court to exclude the operation of the statute of 1797.¹ Although as a general rule the United States are not bound by the provisions of any law in which they are not expressly mentioned, yet if a particular statute is clearly designed to prescribe the only rules which should govern the subject to which it relates, it will repeal any former one on that subject.²

Upon this principle the supreme court arrives at the conclusion that the general banking law, being designed to form a complete system of banking law, excluded the operation of all other statutes which might seriously impede or impinge upon the consummation of that design. Among other things, it excluded the operation of the priority statute under consideration as incongruous and inconsistent with the symmetry of the banking system. United States depositary banks, therefore, constitute an exception to the

¹ U. S. Rev. Stat., § 3466.

² Daviess v. Fairbairn, 3 How. (44 U. S.) 636; United States v. Tynen, 11 Wall. (78 U. S.) 88.

rule that all debtors of the government are subject to the provision which entitles the United States to priority of payment.¹

§ 288. Right of surety to be subrogated to the government priority of payment. — “ Whenever the principal in any bond given to the United States is insolvent, or whenever such principal being deceased, his estate and effects which have come to the hands of his executor, administrator, or assignee, are insufficient for the payment of his debts, and in either of such cases, any surety on the bond or the executor, administrator, or assignee of such surety pays to the United States the money due upon such bond, such surety, his, executor, administrator, or assignee, shall have the like priority for the recovery and receipt of the moneys out of the estate and effects of such insolvent or deceased principal, as is secured to the United States; and may bring and maintain a suit upon the bond in law or equity, in his own name, for the recovery of all moneys paid thereon.”² The foregoing is the language of the act of congress of March 2, 1799, ch. 22, § 65, U. S. Statutes at Large, Vol. 1, 676. It would seem to be sufficiently clear to explain itself. The supreme court of the United States has however, found it necessary or expedient to declare in affirmance of the statute rather than in its construction that: “ The same right of priority, which belongs to the government, attaches to the claim of an individual, who, as surety, has paid money to the government.”³

§ 289. Apportionment and appropriation of payments. — This subject has been elsewhere treated, and its relations to debts due to the United States has been partially considered. It is not inappropriate, however, to

¹ Cook County Nat. Bank *v.* United States, 17 Otto (107 U. S.), 445.

² U. S. Rev. Stat., § 3468.

³ Hunter *v.* United States, 5 Pet. (30 U. S.) 182.

review the subject in this connection, as many of the cases in which questions of apportionment of payments have arisen, grow out of the relations of the federal government with its debtors, by bond or otherwise.

The general doctrine, it will be remembered, is that the debtor has a right, if he pleases, to make the appropriation of payments; if he omits it, the creditor may make it; if both omit it, the law will apply the payments according to its own notions of justice. It is certainly too late for either party to claim a right to make an appropriation after the controversy has arisen and, *a fortiori* at the time of the trial. In cases of long and running accounts, where debits and credits are constantly occurring, and no balances are otherwise adjusted than for the mere purpose of making rests, the appropriation of payments is controlled by the order of time in which they are made.¹ And the rights of the debtor to apportion and apply his payment is in no degree affected by the statutes already considered, which give to the United States the right of priority of payment out of the effects of its insolvent debtor. Those statutes do not confer upon the United States the right to a priority of satisfaction of one over another separate debt of the same person to the government. Hence, where a collector, being indebted to the United States on more than one account, made a deed of trust of his property to secure his debts to the government, but before doing so, transferred to the sureties on his official bond \$10,000, the amount of the penalty, and they forthwith paid that sum into the treasury in satisfaction of the bond, such payment released them from their liability, because the debtor had a right to apportion his payment, and apply his money to one part of the creditor's demand rather than another. Having received the money from their principal for that purpose, the sureties had a right to pay the penalty of their bond with it, and

¹ *United States v. Kirkpatrick*, 9 Wheat. (22 U. S.) 720.

this whether the payee of the bond had notice that the money was the money of the principal, or supposed it to be that of the sureties.¹

§ 290. **Same subject continued.** — The length of time during which a debtor may make his election and appropriate the payments which he has made, has not been very distinctly settled by the authorities. By the civil law, the appropriation of the payment must be made simultaneously with the payment itself.² And the same rule applied to the creditor as well, he must make his election when he receives the money. If both were silent, the law would decide from the presumed intention, first of the debtor, then of the creditor. In the English books, however, there is much authority for the doctrine that in the absence of express election by both parties, the presumed intention and wishes of the creditor must govern the apportionment.³ The right of the debtor to elect on which of two or more accounts he will have his payment credited is undoubted, and his election may be either express or implied, but if without making any such election he pays money, the creditor may apply it to which account he pleases.⁴ This seems to be the English rule on the subject. Chief Justice Marshall holds the same doctrine,⁵ adding: “No principle is recollectible which obliges the creditor to make his election immediately. After having made it, he is bound by it.” And Mr. Justice Story holds similar language in *Kirkpatrick v. United States*.⁶

¹ *United States v. Cochran*, 2 Brock. 274. See, also, *Leggett v. Humphries*, 21 How. (62 U. S.) 66, 80.

² *Devayne v. Noble* (Clayton's Case), 1 Merivale, 604.

³ *Goddard v. Cox*, 2 Strange, 1194; *Newmarch v. Clay*, 14 East, 242; *Peters v. Anderson*, 5 Taunt. 596. But, see, *Meggott v. Miles*, 1 Ld. Raymd. 287; *Dome v. Holdworth*, Peake N. P. 64.

⁴ *Peters v. Anderson*, 5 Taunt. 596.

⁵ *Mayor of Alexandria v. Patton*, 4 Cranch (8 U. S.), 320.

⁶ *Wheat.* (22 U. S.) 724.

From these authorities the supreme court of the United States arrives at the conclusion that as between the United States and the sureties on the official bond of a deputy postmaster, where there is a running account between the officer and the post-office department, the latter may apply all payments as they are successively made to the extinguishment of the preceding balances.²

And where there are two bonds, and a payment is made generally and without specific directions, it will be applied to the oldest debt, which of course would be due under the first bond. If it is sought to have it applied to the balances due under the second bond, it must be proved that the funds were derived from receipts accruing under that bond.²

§ 291. Succession bonds — Appropriations of payments — Rights of sureties. — The rule for the appropriation of payments between parties acting in their own right does not obtain as between the collecting officers of a state, or of the United States and the auditing and accounting officers. The rule that without instructions from the debtor, the creditor may apply a payment to any one of several distinct debts, or if he fails to do so, that the law will apply such payment as may best consist with equity, cannot be enforced in such a manner as to operate an injustice to sureties on the official bond of a public officer. This principle has been well established by numerous adjudged cases in the supreme court of the United States, as well as other eminent tribunals.³ The rule to be gathered from these cases is that where an officer is continued in office for more

¹ *Jones v. United States*, 7 How. (48 U. S.) 681, 692. See, also, *Postmaster-General v. Norvell, Gilpin*, 134.

² *Boody v. United States*, 1 Woodb. & M. 150.

³ *United States v. Eckford*, 1 How. (42 U. S.) 261; *Jones v. United States*, 7 How. (48 U. S.) 688; *United States v. January*, 7 Cranch (11 U. S.), 575; *Meyers v. United States*, 1 McLean C. C. 496; *Pickering v. Day*, 2 Del. Ch. 367; *Bering v. Williams*, 17 Ala. 525; *Porter v. Stanley*, 47 Me. 518.

than one term, giving bonds with different sureties for the different terms, and is in default for one of those terms, the sureties for that term are responsible for that default, and payments made by him during a later term cannot be applied to the satisfaction of that default to the injury of the sureties on the bond current when the payment is made. This principle is fully adopted in a very recent case (1882) in Texas, in which it is held that taxes collected and paid into the treasury, cannot be applied to the payment of a pre-existing debt of the tax collector on a former account. The collector cannot authorize it nor can the comptroller apply it to the injury of the sureties of the collector, and no action of either of them can deprive the sureties of the benefit of the payment of such funds into the treasury by their principal.¹ And there seems to be no reason why the same principle does not apply with equal force to the relations between the United States and its officers.

§ 292. Apportionment of payments — Statute of limitations. — The rule as to the apportionment of payments as involving the interests of successive sets of sureties, has been elsewhere considered; like questions sometimes arise where there are successive bonds, but the same set of sureties. Thus, where an officer had given successively three bonds with the same sureties, and the government had kept with him a general or running account, and payments had been made without specific instructions, it became very material, in view of the statute of limitations, to which of the three accounts the credit should be given. It was held in such a case, that a payment made four days before the execution of the second was (of course) applicable to the extinction of the balance due under the first bond. And it was further held that under the act of congress of 1836, ch. 270, § 37, payments made during the currency of the

¹ *State v. Middleton*, 57 Tex. 185.

third bond, were applicable to the balance due under the second bond; that statute requiring such appropriation in express terms, to wit, that payments made subsequent to the execution of a new bond by a deputy postmaster shall be first applied to any balance that may be due on the old bond.¹

§ 293. Evidence in actions on official bonds given to the United States.—The general rule is, of course, that the best evidence shall be produced, original documents must be offered, and copies are not available unless authority to admit them has been granted by statute, or the impossibility of producing the original, shown by affidavit or otherwise. So far as actions by the United States on the bonds of its officers are concerned, there have been several statutes enacted which provide for the admission in evidence of transcripts duly authenticated from the records of the several departments of the government. Under these statutes it is not necessary that the transcript from the books of a department be accompanied by copies of the receipts of the officer whose bond is in suit, because the original voucher is accessible to him, and he can produce it if it is to his advantage to do so.²

In an action on the official bond of a marshal, a transcript of his accounts with the government, furnished by the treasury department, makes a *prima facie* case against him, and it is not necessary to give him any notice to account. In common with other officers of the government the manner and terms of his accounting are regulated by statutes, to which he and they are required to conform.³ Upon the

¹ *Boody v. United States*, 1 Woodb. & M. C. C. 150, 171; *s. c.* 4 Myers' Fed. Dec., §§ 435, 436; citing and distinguishing, *United States v. Eckford*, 1 How. (42 U. S.) 250; *Myers v. United States*, 1 McLean C. C. 498; *United States v. January*, 7 Cranch (11 U. S.), 572; *Postmaster-General v. Norvell*, Gilp. 106, 126; *United States v. Kirkpatrick*, 9 Wheat. (22 U. S.) 720.

² *Bruce v. United States*, 17 How. (58 U. S.) 437.

³ *Walton v. United States*, 9 Wheat. (22 U. S.) 651; *Smith v. United States*, 5 Pet. (30 U. S.) 292.

same principle the only rights to the defense of set-offs to which the official debtor to the government is entitled are those derived from acts of congress, for the right of set-off did not exist at common law, but as between individuals is derived from the statute of Geo. II., ch. 24, § 4. It was held by the supreme court of the United States in 1815¹ that as between the United States and persons indebted to the government, no accounts were admissible by way of set-off against the United States unless they were such as were authorized by act of congress; to wit, claims that had been presented to the proper accounting officers of the treasury, and been rejected by them. Claims of this character the defendant may offer by way of set-off or counter-claim to the demand against him, and they will be allowed if he can show that he is entitled by law to credit for them, and that the accounting officers were in error when they rejected them. As the whole subject of set-off, so far as the United States are concerned, is regulated by statute, it is hardly necessary to say that local laws or usages can have no weight in determining questions which grow out of it.²

In actions on official bonds given to the United States, transcripts of the officer's accounts with the government taken from the books of the appropriate department, and duly certified are, by acts of congress, admissible in evidence against the officer and his sureties. They are, however, only *prima facie* evidence when they relate to the regular and ordinary transactions of the government. If it appears upon the face of the accounts that items were charged against the officer which had not come to his hands

¹ United States *v.* Giles, 9 Cranch (18 U. S.), 236.

² Watkins *v.* United States, 9 Wall. (76 U. S.) 759, 766; *s. c.*, 4 Myers' Fed. Dec., §§ 337, 338, 339, 340. See, also, United States *v.* Wilkins, 6 Wheat. (19 U. S.) 143; United States *v.* McDaniel, 7 Pet. (32 U. S.) 17; United States *v.* Ripley, 7 Pet. (32 U. S.) 25; United States *v.* Fillebrown, 7 Pet. (32 U. S.) 48; United States *v.* Robison, 9 Pet. (34 U. S.) 324; Gratiot *v.* United States, 15 Pet. (40 U. S.) 370; United States *v.* Davis, Deady C. C. 294, 299.

in the due course of official business, and of which the accounting officers could have no official knowledge, the transcripts are not competent evidence of such outside charges.¹

§ 294. Defenses — Set-offs against the United States in actions on official bonds. — The rule that no claims, credits or set-offs can be used as defenses to an action by the government against a public debtor, except such as have been duly presented for allowance to the proper auditing or accounting officers of the government and rejected by them, is founded on the soundest principles of public policy. It eliminates from the judicial proceedings all uncontested claims, secures the public accounts from confusion and uncertainty, and still leaves the defendant at full liberty to establish if he can by legal proof such claims as the official accountant has felt it his duty to reject. And the rejection of such claims by the accounting officer justifies no presumption against them. When the government comes before a judicial tribunal as a litigant party its position is in most respects that of equality with the citizen, and it is entitled to no special immunities except those conferred by law, such as priority of payment and exemption from all charges of laches. Consequently the courts refuse to admit as matter of defense in actions on official bonds, all evidence of claims, payments, or set-offs which have not been tried and found wanting by the proper accounting officers.²

¹ *Bruce v. United States*, 17 How. (58 U. S.) 433, 437; *s. C.*, 4 Myers' Fed. Dec., §§ 579, 580; citing, *Smith v. United States*, 5 Pet. (30 U. S.) 292; *Cox v. United States*, 6 Pet. (31 U. S.) 202; *United States v. Buford*, 3 Pet. (28 U. S.) 29; *United States v. Jones*, 8 Pet. (33 U. S.) 376.

² *United States v. Lent*, 1 Paine C. C. 417; *United States v. Smith*, 1 Bond C. C. 68; *Halliburton v. United States*, 13 Wall. (80 U. S.) 63; *United States v. Giles*, 9 Cranch (13 U. S.), 212; *Cox v. United States*, 6 Pet. (31 U. S.) 172.

And the rule that a claim or set-off must be rejected by the accounting officers of the government before it is admissible in evidence in an action on an official bond, does not apply when the claim in question is for a payment made by a surety after the death of his principal as part satisfaction of the default upon which suit is brought. In such case the surety may show by a treasury transcript or presumably otherwise, that such payment had been made and credit given on the account of the principal.¹

§ 295. Action — Jurisdiction of federal courts — U. S. marshal's bond. — As the official bond of a United States marshal is given under the authority of acts of congress it would appear that the proper forum for action on such bonds was a federal court. And it has been so held in a case in which an action was instituted in a circuit court of the United States against a marshal on his official bond by a citizen of the state of which the marshal was a citizen, the cause of action being an alleged breach of the bond. It was further held that the jurisdiction of federal courts in suits upon marshal's bonds is in effect exclusive.²

§ 296. Liability of United States marshals for deputy — Measure of damages — A marshal is of course, liable on official bond for the neglect of his deputy in the execution of process, and the measure of his liability is the extent of the injury produced thereby. If the loss of the debt is the direct and legal consequence of the deputy's neglect or failure to serve the process, the amount of the debt is the measure of damages, but it does not follow that because a deputy failed to serve process, that the debt was

¹ *Cox v. United States*, 6 Pet. (31 U. S.) 172, 200.

² *Wetmore v. Rice*, 1 Biss. C. C. 237, 242; *s. c.*, 4 Myers' Fed. Dec., §§ 314, 315; citing, *Sperring v. Taylor*, 2 McLean C. C. 362; *Givin v. Breedlove*, 2 How. (43 U. S.) 29; *Postmaster, etc., v. Early*, 12 Wheat. (25 U. S.) 136. See, also, *Adler v. Newcomb*, 2 Dill. C. C. 45.

lost. Whether the loss of the debt was the direct legal consequence of the negligence of the officer is a question of fact for a jury. A deputy marshal having arrested a defendant on mesne process has no right to receive the money and discharge his prisoner, if he does so, it is a misfeasance in office for which the marshal is liable on his official bond — to the extent of the injury inflicted upon the plaintiff. The duty of the deputy marshal was to follow his writ, arrest the party, and take bail if it was offered not to collect the money.¹ It must be borne in mind that it is not the receipt of the money for which the deputy marshal is responsible, but the discharge of the prisoner. The receipt of the money was extra-official, the plaintiff had a right to disregard it and the return made upon it by the deputy, and prosecute his remedy against the marshal for a false return. The amount of money received by the deputy formed no measure of the damages sustained.²

§ 297. When additional duties imposed by law upon the obligor after the execution of his bond, do not affect sureties. — The law enters into and forms a part of every contract, but as a general rule the law that does so, is that which is in force at the time the contract is made. It is true that contracts may be made with express or implied reference to laws that may thereafter be enacted. The responsibility of sureties in this connection, is, however, much more limited than that of their principal. “Any substantial addition by law to the duties of the obligor of a bond after the execution of the instrument, materially enlarging his liabilities, will not impose any additional responsibility upon his sureties, unless the words of the bond by a fair and reasonable construction bring such sub-

¹ United States v. Moore, 2 Brock. C. C. 317.

² United States v. Moore, 2 Marshall C. C. 317, 324; s. c., 4. Myers' Fed. Dec., §§ 317, 318.

sequently imposed duties within its provisions.” While this is certainly the general rule, its force has been very much weakened by judicial construction of the conditions and recitals of various official bonds. Thus a distiller’s bond, conditioned that the principal shall comply with *all* the provisions of law in relation to the duties and business of distillers, and pay all penalties and fines incurred, etc., has been held to bind the sureties for the faithful discharge of duties imposed upon the principal, by laws subsequently enacted. The court remarks with much reason: “Both parties it must be assumed knew that changes might be made in that behalf at any time, and the defendants must have understood that it never could have been intended that a new bond should be required with every modification made in relation to the duties and business in which the principals were about to engage.” And upon this principle it was held that the bond given by distillers was comprehensive enough to include the duty afterwards imposed, to reimburse the United States for salaries of store-keepers.¹

§ 298. Limitation upon the privileges of sureties. — A surety has no right to be released from his obligation because an officer of the government fails in the discharge of his duty in a matter in which the surety is collaterally interested. Thus where a distiller’s bond was approved by the assessor before prior liens upon the distillery property were released, so that the statutory lien of the United States could operate upon it, that fact did not exonerate the sureties on the distiller’s bond. It is true that the surety in a proper case is entitled to be subrogated to the government lien, that the lien is a security held by the government, of

¹ *United States v. Powell*, 14 Wall. (81 U. S.) 493, 504; *s. c.*, 4 Myers’ Fed. Dec. §§ 631, 632, 634; citing, *Farr v. Hollis*, 9 Barn. & Cr. 332; *King v. Nicholls*, 16 Ohio St. 82; *United States v. Bradley*, 10 Pet. (35 U. S.) 343; *Cameron v. Campbell*, 8 Hawks, 285. See, also, *White v. Fox*, 22 Me. 341; *United States v. Hodsdon*, 10 Wall. (77 U. S.) 406; *United States v. Tingey*, 5 Pet. (30 U. S.) 127.

the benefit of which the surety may avail himself, but all that does not make the lien a condition precedent to his liability on his bond. If the assessor fails to discharge his duty, he is liable to the government, but he owes no duty to the surety. The government having two securities, the lien and the bond, will, in such case, have lost one of them by the negligence of its officer, but that is no reason why it should also lose the other, for neither the government nor its assessor is under any obligation to protect the surety against his contingent and collateral liability on his bond.¹

§ 299. Fraud of principal or negligence of government officers will not discharge surety. — It is a well settled principle that the primary and chief duty of government officials, is to the government under which they hold their commissions. Under certain circumstances and conditions they may possibly be under obligations to other persons to discharge their regular duties at particular times or in some special manner. Such cases, however, are rare and exceptional. The negligence of government officers in the discharge of their duties can operate, therefore, no discharge of sureties from the obligation of official bonds, still less can they be excused by the fraud of their own principal. A fraud perpetrated by the shipment of rubbish purporting to be tobacco, in tobacco boxes, and by the negligence of the inspector, certified to be tobacco, in no degree operated to discharge the sureties who had bound themselves that the tobacco should be transported.²

§ 300. When surety is liable for past defaults — When not liable. — It is well settled that sureties are not liable for past defaults unless made so by the terms of their

¹ Osborne *v.* United States, 19 Wall. (86 U. S.) 577, 581; *s. c.*, 4 Meyers' Fed. Dec. § 641.

² Ryan *v.* United States, 19 Wall. (86 U. S.) 514, 518; *s. c.* 4 Meyers' Fed. Dec., § 678.

bonds. A question may however arise, whether the default is actually *past*, or whether it was committed after the bond went into operation. Thus, where money came into the hands of the officer before the execution of the bond upon which suit was brought, the sureties are certainly liable for it, if it was actually as well as lawfully in his hands when the bond was executed. In that case, the sureties may prove that the default, the illegal conversion of the funds, as well as the receipt of them, took place before they were in any condition to be liable for them at all. The surety of an officer who is in charge of public money is liable of course for such money as may be legally in his hands when the bond was executed, but they have a right to show that no such funds were then in his hands.¹

§ 301. Right of surety by subrogation to priority of payment.— It has already been said that a surety who has paid his principal's debt to the government of the United States has a right to be subrogated to its priority of payment. It need only to be added that his right to priority is co-extensive with that of the government, and covers all the property of the party indebted which the government could have subjected to its demand.²

§ 302. Surety—Nature and extent of his obligation.— The obligation of a surety is strictly legal, he is bound only by the bond itself and is under no moral obligation to pay, hence equity will not interfere to charge him beyond his legal liability. It is true that equity will relieve against sureties as well as principals in cases of fraud, accident, and mistake, but this is not upon the principle of enforcing an

¹ *Farrar v. United States*, 5 Pet. (30 U. S.) 373, 389; *s. c.*, 4 Myers' Fed. Dec., § 489. See, also, *United States v. Boyd*, 5 How. (46 U. S.) 29, 56.

² *Hunter v. United States*, 5 Pet. (30 U. S.) 173, 189; *s. c.*, 4 Myers' Fed. Dec., § 527. See, also, *United States v. Cochran*, 2 Brock. C. C. 274; *Pollock v. Pratt*, 2 Wash. C. C. 490; *United States v. Preston*, 2 Wash. C. C. 466.

equitable obligation, but of removing obstacles to the enforcement of existing legal rights. Where, however, the legal liability is fully discharged, equity will not hold a surety liable. It will not revive an extinguished legal obligation or legal remedy against a surety who has been discharged by the voluntary act of the obligee.¹

To hold a surety on an official bond liable for money charged against his principal, it must appear that such money either in point of fact, or in judgment of law, came into the hands of such principal before the expiration of the term for which the surety was bound. And a surety is not liable for the fidelity or responsibility of an agent through whom the government may see fit to transmit the public money to his principal. His responsibility is limited to such money as the officer may have received, either by himself, or *his* accredited agent during the currency of the bond, and the term of office which it represented, and which he failed to account for. And the burden of proof is upon the government to show that during his term of office the officer had received the money with which the surety is sought to be charged.²

§ 303. Liability of United States marshals for attaching the property of one person for the debt of another. — This subject, so far as it relates to ministerial officers generally, has been considered elsewhere, but it is not inappropriate to close this chapter by referring to a very recent

¹ *United States v. Price*, 9 How. (50 U. S.) 83, 108; 4 Myers' Fed. Dec., § 541; citing, *Wright v. Russell*, 8 Wils. 530; *Simpson v. Field*, 2 Ch. Cas. 22; *Waters v. Riley*, 2 Harr. & G. 310; 18 Am. Dec. 302; *Harrison v. Field*, 2 Wash. (Va.) 136; *Weaver v. Shryock*, 6 Serg. & R. 262; *Kennedy v. Carpenter*, 2 Whart. 361. *Contra*, *United States v. Cushman*, 2 Sumn. 426; *Higgens' Case*, 6 Coke, 44; *Lechmere v. Fletcher*, 1 Crompt. & M. 628; *Sheehy v. Mandeville*, 6 Cranch (10 U. S.), 253.

² *Bryan v. United States*, 1 Black (66 U. S.), 140, 149; *s. c.*, 4 Myers' Fed. Dec.; §§ 563, 564. See, also, *United States v. Spencer*, 2 McLean C. C. 265.

decision by the supreme court of the United States, in which the whole subject is very thoroughly reviewed, and the law specially applied to the marshal, the chief ministerial officer of the courts of the United States. A marshal having by virtue of mesne process, (a writ of attachment), seized as the property of the defendant, certain goods which were claimed by a stranger to the action, and suit having been brought, the claimant recovered judgment against the marshal and his sureties or his official bond. The supreme court of the United States affirmed the judgment and in delivering the opinion of the court Mr. Justice Gray said: —

“The marshal, in serving a writ of attachment on mesne process, which directs him to take the property of a particular person, acts officially. His official duty is to take the property of that person, and of that person only; and to take only such property of his as is subject to be attached, and not property exempt by law from attachment. A neglect to take the attachable property of that person, and a taking, upon the writ, of the property of another person, or of property exempt from attachment, are equally breaches of his official duty. The taking of the attachable property of the person named in the writ is rightful; the taking of property of another person is wrongful, but each, being done by the marshal in executing the writ in his hands, is an attempt to perform his official duty and is an official act.

“A person other than the defendant named in the writ, whose property is wrongfully taken, may indeed sue the marshal, like any other wrong-doer, in an action of trespass, to recover damages for the wrongful taking; and neither the official character of the marshal, nor the writ of attachment, affords him any defense to such an action.¹

“But the remedy of a person whose property is wrongfully taken by the marshal in officially executing his writ is

¹ Day *v.* Gallup, 2 Wall. 97; Buck *v.* Colbath, 3 Wall. 334.

not limited to an action against him personally. His official bond is not made to the person in whose behalf the writ is issued, nor to any other individual, but to the government, for the indemnity of all persons injured by the official misconduct of himself or his deputies; and his bond may be put in suit by and for the benefit of any such person.

“ When a marshal upon a writ of attachment on mesne process takes property of a person not named in the writ, the property is in his official custody and under the control of the court, whose officer he is and whose writ he is executing; and according to the decisions of this court the rightful owner cannot maintain an action of replevin against him, nor recover the property specifically, in any way except in the court from which the writ issued.¹

“ The principle upon which those decisions are founded is, as declared by Mr. Justice Miller, in *Buck v. Colbath*, above cited, ‘ that whenever property has been seized by an officer of the court, by virtue of its process, the property is to be considered as in the custody of the court and under its control for the time being; and that no other court has a right to interfere with that possession, unless it be some court which may have a direct supervisory control over the court whose process has first taken possession, or some superior jurisdiction in the premises.’² Because the law had been so settled by this court, the plaintiff in this case failed to maintain replevin in the courts of the state of Nevada against the marshal, for the very taking which is the ground of the present action.³

“ For these reasons, the court is of opinion that the taking of goods upon a writ of attachment into the custody of the marshal, as the officer of the court that issues the writ,

¹ *Freeman v. Howe*, 24 How. 450; *Krippendorf v. Hyde*, 110 U. S. 276.

² 3 Wall. 341.

³ *Feusier v. Lemmon*, 6 Nev. 209.

is, whether the goods are the property of the defendant in the writ or of any other person, an official act, and therefore, if wrongful, a breach of the bond given by the marshal for the faithful performance of the duties of his office.

"Upon the analogous question whether the sureties upon the official bond of a sheriff, a coroner, or a constable, are responsible for his taking, upon a writ directing him to take the property of one person, the property of another, there has been some difference of opinion in the courts of the several states.

"The view that the sureties are not liable in such a case has been maintained by decisions of the supreme courts of New York, New Jersey, North Carolina and Wisconsin, and perhaps receives some support from decisions in Alabama, Mississippi and Indiana.¹

"But in *People v. Schuyler*,² the judgment in 5 Barb. 166, was reversed and the case of *Ex parte Reed*,³ overruled by the majority of the New York court of appeals, with the concurrence of Chief Justice Bronson, who had taken part in deciding Reed's case. The final decision in *People v. Schuyler* has been since treated by the court of appeals as settling the law upon this point.⁴ And the liability of the sureties in such cases has been affirmed by a great preponderance of authority, including decisions in the highest courts of Pennsylvania, Maine, Massachusetts, Ohio, Virginia, Kentucky, Missouri, Iowa, Nebraska, Texas, and

¹ *Ex parte Reed*, 4 Hill, 572; *People v. Schuyler*, 5 Barb. 166; *State v. Conover*, 4 Dutch. 224; *State v. Long*, 8 Ired. 415; *Staté v. Brown*, 11 Id. 141; *Gerber v. Ackley*, 32 Wis. 233, and 37 Id. 43; *s. c.* 19 Am. Rep. 751; *Governor v. Hancock*, 2 Ala. 728; *McElhaney v. Gilleland*, 30 Id. 183; *Brown v. Moseley*, 11 Sm. & Marsh. 354; *Jenkins v. Lemonds*, 29 Ind. 294; *Carey v. State*, 34 Id. 105.

² 4 N. Y. 173.

³ 4 Hill, 572.

⁴ *Mayor, etc., of New York v. Sibberns*, 3 Abb. App. Dec. 266; *s. c.* 7 Daly 436; *Cumming v. Brown*, 43 N. Y. 514; *People v. Comstock*, 93 Id. 585.

California, and in the supreme court of the District of Columbia.¹

"In *State v. Jennings* above cited, Chief Justice Thurman said: 'The authorities seem to us quite conclusive that the seizure of the goods of A. under color of process against B. is official misconduct in the official, making the seizure; and is, a breach of the condition of his official bond, where that is that he will faithfully perform the duties of his office.' The reason for this is that the trespass is not the act of a mere individual, but is perpetrated *colore officii*. If an officer under color of a *f. fa.* seizes property of the debtor which is exempt from execution, no one, I imagine, would deny that he had broken the condition of his bond. Why should the law be different if, under color of the same process, he takes the goods of a third person? If the exemption of the goods from the execution in the one case makes their seizure official misconduct, why should it not have the same effect in the other? True, it may sometimes be more difficult to ascertain the ownership of the goods, than to know whether a particular piece of property is exempt from execution; but this is not always the case, and if it were, it would not justify us in restricting to litigants the indemnity afforded by the official bond, thus leaving the rest of the community with no other indemnity against official misconduct than the responsibility of the officer might furnish.'²

"So in *Lowell v. Parker*,³ a constable authorized by

¹ *Carmack v. Commonwealth*, 5 Binn. 184; *Bennett v. McKee*, 6 W. & S. 513; *Archer v. Noble*, 3 Greenl. 418; *Harris v. Hanson*, 2 Fairf. 241; *Greenfield v. Wilson*, 13 Gray, 384; *Tracy v. Goodwin*, 5 Allen, 409; *State v. Jennings*, 4 Ohio St. 418; *Sangester v. Commonwealth*, 17 Gratt. 124; *Commonwealth v. Stockton*, 5 T. B. Mon. 192; *Jewell v. Mills*, 3 Bush, 62; *State v. Moore*, 19 Mo. 369; *State v. Fitzpatrick*, 64 Id. 185; *Charles v. Haskins*, 11 Ia. 829; *Turner v. Killian*, 12 Neb. 580; *Holliman v. Carroll*, 27 Tex. 23; *Van Peet v. Littler*, 14 Cal. 194; *United States v. Hine*, 8 McAr. 27.

² 4 Ohio St. 423.

³ 10 Met. 309, 313.

statute to serve only writs of attachments in which the damages were laid at no more than \$70, took property in a writ in which the damages were laid in a greater sum. In an action on his official bond, it was argued for the sureties that they were no more answerable than if he had acted without any writ. But Chief Justice Shaw, in delivering the opinion of the supreme judicial court of Massachusetts, overruling the objection and giving judgment for the plaintiff, said: ‘He was an officer, had authority to attach goods on mesne process on a suitable writ, professed to have such process, and thereupon took the plaintiff’s goods; that is, the goods of Bean for whose use and benefit this action is brought and who may, therefore, be called the plaintiff. He, therefore, took the goods *colore officii*, and though he had no sufficient warrant for taking them, yet he is responsible to third persons, because such taking was a breach of his official duty.’’¹

This case as the latest adjudication upon the subject by a court of great dignity and authority, and, reviewing the numerous decisions of the various state courts, should go far to settle the law as to the liability of officers of every grade and their sureties on their official bonds for acts done by such officers *colore officii*.

¹ *Lammon v. Feusier*, 111 U. S. 17, 22; *s. c.*, 4 Sup. Ct. Reporter, 286; *s. c.*, 16 Chicago L. N. 357; *s. c.*, 1 Am. Law. Jour. 291.

CHAPTER IX.

OFFICIAL BONDS OF STATE, COUNTY, TOWNSHIP AND MUNICIPAL OFFICERS.

- SECTION 310. The general use of official bonds in the several states.
311. State legislation on official bonds — Mode of treating the subject.
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313. State, county, township and municipal officers who do, and who do not give bonds.
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316. Defense of time given to the principal — How affected by the fact that the state is the obligee.
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318. When official bonds are cumulative.
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320. Bonds that may be required by counties and townships of their respective officers.
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328. Official bond — When and where a condition precedent to tenure of state office.
329. Surety on constable's official bond not liable (in New York) for seizure by his principal of the property of one person by virtue of an execution against another.
330. Official bonds prescribed by state authority similar in their incidents to other official bonds.

§ 310. **The general use of official bonds in the several states** — The several states, as well as the general government, seem to rely with great confidence on the security which official bonds are supposed to afford to public interests, and exact them from every variety of executive and ministerial officers. Especially are they required of those officers whose lapses from duty and recitude might be expected to affect injuriously, either the public finances, the due execution of the laws, or the private interest of individuals with whom such officers have any official relation. Not only are officers of this class whose connection with the state is direct, required to furnish security for the due performance of their official functions, but the same safeguard is thrown around the public and private interests involved in the powers delegated to counties, townships, and municipal corporations. By public statutes, or by resolutions, by-laws, ordinances, and orders made in pursuance, or by authority of public statutes, official bonds are prescribed which must be given by all ministerial officers, whose functions affect either the public welfare, or the private rights and interests of citizens. Whenever a functionary of any grade is endowed by law or ordinance with powers involving the receipt or custody of public money or property, on the liberty or property of private persons, that officer, as a rule, is bound to give security that he will faithfully discharge the duties which the law imposes upon him. The bond is universally considered the great safeguard of the public interest as well as the surest remedy of private grievances.

§ 311. **State legislation on official bonds — Mode of treating the subject.** — The official bond being so universally used and relied upon by all the American states, it would be manifestly impossible within the limits of a work of this character to enumerate even one-half of the statutes and ordinances by which such instruments are authorized in

the several states, to say nothing of the special and local legislation on the subject, imposing certain liabilities on particular officers and their sureties, and exempting others from other responsibilities.

Nor would such work, if it were practicable, tend to edification. The distinctions and differences which would appear between the legislation of one state and that of another would be of merely local concern, would mark only limited and special interests, would point no moral, and elucidate no principle.

The only reasonable mode of treating this subject is to extract from the numerous rulings of the several state courts of the last resort, the general principles controlling the questions which affect official bonds and arising out of the statutes that prescribe the terms and conditions of those bonds. These principles are distributed in the course of this work under the various heads to which, from the character of the subject-matter of the rulings, they are properly referable.

§ 312. The classes of bonds prescribed by state statutes.—Official bonds prescribed by state statutes are of four classes. First, the bonds of state, county, township, and municipal officers; second, those of executors, guardians, administrators, and trustees; in this class may be included all bonds required of persons who, not being in a proper sense, officers of the law, are nevertheless acting continuously under the supervision of courts of justice; third, bonds required in judicial proceedings, bail bonds, appeal bonds, and other bonds required of persons not officers of the law or the courts, but subjected, *quoad* the bond, to the special jurisdiction of the court; fourth, bonds prescribed under statutory authority by the charters and by-laws of private corporations, such as banks, railroads, and other companies. Each of these classes will be treated in the order in which they are named, and this chapter is devoted to the first.

§ 313. State, county, township and municipal officers, who do and who do not give bonds. — It has already been said that as a general rule, the necessity of giving official bonds is limited to ministerial or executive officers. Political officers properly so-called, and judicial officers generally, are exempted from that necessity. Justices of the peace in a number of the states are, however, required to give bonds; in some, as in Tennessee, conditioned only for the payment to the county trustee of the fines they may receive or collect;¹ in others, as in Indiana, Iowa, etc., for the faithful discharge of their duties as justices, and for paying over on demand to the person authorized to receive the same, all moneys that may come to their hands as justices.²

§ 314. Liability of justices of the peace on their official bonds. — As justices of the peace are the only judicial officers who are obliged to give official bonds, it is pertinent to inquire here how far and in what respects they are liable upon them. It was held in Indiana, in 1852, that a justice who had acted in an oppressive, illegal, and corrupt manner, was liable in damages on his official bond and his sureties with him.³ In later cases, however, in the same state, the liability of justices on their official bonds was distinguished and defined. It was held that judicial officers “are not liable for mistakes of judgment or erroneous decisions; but they are liable for trespasses committed under color of judicial authority where they have no jurisdiction over the parties or the subject-matter.” This, however, it may be remarked, was an action for false imprisonment, and not upon the official bond of the justice.⁴ And in

¹ Th. & St. Code. (Tenn.), § 5004.

² Rev. Stat. of Ind. (1881), § 1421; Laws of Iowa (1873), §§ 674, 678.

³ State v. Flinn, 3 Blackf. 72. See, also, Poult v. Slocum, 3 Blackf. 421; State v. Littlefield, 4 Blackf. 129; Barkaloo v. Randall, 4 Blackf. 476; 32 Am. Dec. 46; Noel v. State, 6 Blackf. 523; Weaver v. State, 8 Blackf. 563.

⁴ Dietrichs v. Schaw, 43 Ind. 175, 179.

an action on the official bond of a justice, a recovery was had for money received by him in payment of a note which had been placed in his hands for collection, on which, however, no process had been issued.¹ In a still later case, it is laid down correctly as the law, that "judicial officers, as judges of courts and justices of the peace, although they may be impeached for corrupt actions, cannot be held pecuniarily responsible to the party injured. This is a fundamental principle in jurisprudence."² This is the key to the whole matter. The justice is not liable as a judicial officer, even for fraud, to the party injured; he is liable to impeachment or equivalent proceeding; but if under the statutes of the state he has given a bond, he and his sureties are liable upon that bond for fraud, negligence, or other misdemeanor in any part of his official duty which is of an executive, or ministerial character; as for example for not issuing process, when he should have done so, it being his duty to issue it, not that of other persons to apply for it; or for failure to pay over money which has been legally paid into his hands, and for other abuses of his trust, and lapses from the duties which grow out of his official character.

In Iowa, it has already been said, justices of the peace are required to execute official bonds, chiefly, it may be presumed, to secure the proper application of moneys which may come to their hands in their *quasi*, ministerial and executive capacity.³ It was held, however, in that state, that, although the primary object of the bond was to secure the due payment of money, and the performance of other executive duties, and the justice could not be made responsible upon his bond for error in his judgments, he could, nevertheless, be held responsible for an abuse of the powers with which he had been entrusted. He is liable to an action for wrongs done under color of his office through favor,

¹ Widener *v.* State, 45 Ind., 244.

² Kress *v.* State, 65 Ind. 106.

³ Latham *v.* Brown, 16 Iowa, 118.

fraud, or partiality, and the sureties on his official bond were responsible for his misconduct in these respects.¹

§ 315. Official bonds given to the state or for its benefit. — As political officers do not give official bonds, nor do judicial officers, with the exception already noted; and as no state maintains either an army or navy, or a post-office department, or a custom-house, as few of them have any public lands, or sustain any special or independent relations with Indian tribes, it is manifest that there are very few varieties of bonded officers appurtenant to a state government as compared with those of the same description who derive their powers from the United States. Indeed, the officers who give bonds and who act *directly* under the state governments are comparatively very few in number. Treasurers and comptrollers and their subordinates, clerks of courts, sheriffs, persons in charge of the state prison and of public works, such as railroads and canals in states which possess property of that description, exhaust the list of that class of officers.

From all these, bonds are exacted appropriate to the functions of the officers, and whenever the exigencies of the public service require contracts of any character relating to public works, the state is competent to enter into any engagements consistent with the constitution of the state, and that the United States, which its interest may seem to demand. In this connection it may be remarked that within these limits the power of a state to contract is plenary. The question as to the powers of the United States to take bonds which are not prescribed by any act of congress, and which has been considered in a preceding chapter, cannot arise with reference to the state government, for its powers are original and inherent, not delegated, and limited only by the constitution of the state, and of the United States.

¹ Gowing *v.* Cowgill, 12 Iowa, 495, 498. Citing State *v.* Flinn, 3 Blackf^d. (Ind.) 72.

§ 316. Defense of time given to principal—How affected by the fact that the state is the obligee.—It is undoubtedly the general law that any time given to a principal by the obligee of a bond or other creditor, or any extension of the time of payment, will operate to release the sureties of such principal. This defense is available to the sureties on official bonds, as well as to all others whose liability is collateral to that of a principal debtor, and can be made as well where the indulgence has been granted by a state as by any other obligee. This principle, however, cannot be applied to cases in which the terms of the bond or the statute expressly recognize the right of the state to alter the times when the officer shall be required to pay. In Maryland it was so held in case of a bond, the condition of which was that the principal obligor “shall account for and pay over * * * at such time as the law shall direct.” It was no alteration of such a contract that the legislature appointed a more distant day for the payment of the money than that fixed by law when the bond was executed.¹ In a Missouri case the court says: “The state cannot by a legislative act materially modify a contract between herself and a citizen any more than she can impair the obligations of a contract between citizens. The legislature cannot increase or vary the obligations of a citizen in a contract entered into by him with the state. * * * The suspension of the right of the state to sue upon her demand has been accomplished from the date of the approval of the bill until its repeal, and if the right of the creditor to proceed against the principal is postponed, but for a day, it as effectually discharges the sureties as if it had been suspended for a month or a year.” Upon this reasoning the court held that an act postponing the time previously fixed for a collector of taxes to settle, discharged the sure-

ties on his official bond.¹ This subject, however, is elsewhere more fully treated.

§ 317. When unconstitutionality of statute is unavailable as a defense for a surety. — In an action on the official bond of a tax collector it is not competent for him or his sureties, having admitted the collection of the taxes, to question the constitutionality of the law under which such taxes were laid and collected. Having accepted the office and acted under the law, he cannot escape the payment of the money on the ground that he had no legal authority to collect it. And it is equally incompetent for his sureties to raise that question. He is the agent of the state, and after acting under its orders, cannot set up their illegality or unconstitutionality; the sureties by their bond have guaranteed that he shall do the very thing for the doing or not doing of which they decline to be bound. The constitutionality of the law under which taxes are collected can only be impeached in an action between the collector and the tax-payer.²

§ 318. When official bonds are cumulative. — Official bonds successively given at stated intervals are only cumulative when by the statute they are required to be given during the same term of office, as where an officer whose term is four years, is required by law to give a new bond every year. In such case the sureties on the first are not relieved by the execution of subsequent bonds. It is otherwise, however, when the same person is re-elected or re-appointed annually, the bonds in such case are not cumulative, the sureties for one year are liable only for breaches of the bond occurring during that year, and in no respect bound for defaults committed during the currency of any other bond.³

¹ State v. Roberts, 68 Mo. 234.

² Waters v. State, 1 Gill, 302, 308.

³ State v. Davis, 7 Ired. L. 198.

§ 319. Rule when an obligor is also obligee in an official bond. — It is essential that official bonds, in common with other instruments of like character, should conform to the ordinary rules of legal obligations. Among others the rule that two parties are necessary to make a bargain, or legal contract, must be observed. It was found necessary in North Carolina to decide that the same person cannot be an obligor and an obligee in the same official bond. An obligation of this character was executed to the justices of a county, and two of their number were kind enough to become sureties for the principal obligor. The bond was held to be absolutely void, because there can be no delivery by an obligor to himself, nor by one obligor to another.¹ In Kentucky, on the contrary, the court of appeals, in a like case, held precisely the reverse. Daniel, a stockholder of a bank, had undertaken to settle up its affairs and given a bond, with another stockholder as his security for the due execution of his contract. Both the obligors in the bond were named in it as obligees, together with other stockholders, one of whom filed a bill in equity for the recovery of his interest in the result of Daniel's labors, and sought relief in equity on the ground that no suit could be maintained at law in a case in which the defendants must necessarily be also the plaintiffs. The court dismissed the bill on the ground that a court of equity had no jurisdiction, there being an adequate remedy at law for each stockholder by action upon the bond.²

§ 320. Bonds that may be required by counties and townships of their respective officers. — The subdivisions of the body politic known as counties, townships, and

¹ Justices, etc. *v.* Bonner, 3 Dev. L. 289; citing, Justices, etc., *v.* Shannon-dale, 2 Dev. L. 6; Pearson *v.* Nesbit, 1 Dev. L. 315; 17 Am. Dec. 569.. To the same effect is Davis *v.* Somerville, 4 Dev. 381; Justices *v.* Dozier, 3 Dev. L. 287.

² Daniel *v.* Crook, 3 Dana, 64.

municipal corporations hold a portion of the sovereignty of the state, delegated either by constitutional provision, general statute, or special charter. The county and township officers usually hold their places under the first two of the sources of power above named, the municipal corporations under a specific and separate charter. The *quasi* political and legislative officers of the county and township such as county courts, supervisors selectmen and the like, act under powers granted by statute, and so far as official bonds are concerned, their functions are limited to requiring that the ministerial officers of whom they have jurisdiction furnish in proper time, good and sufficient bonds drawn in proper form, and fortified with adequate sureties, to approve such bonds and cause them to be duly filed and recorded. The bonds of constables, sheriffs, justices of the peace (where bonds are required of justices at all) county treasurers, and generally all officers whose line of duty is conterminous with the county, fall within the jurisdiction of the county court, or equivalent tribunal, whose duty it is to see that the officers execute and file their bonds in due season. The like duty within the narrower limits of township, or town, devolve upon the selectmen. There is little variation in the legislation of the several states on this subject. In many of them, however, although the subdivision of township or civil district is preserved, there is little or no power vested in its officers; their functions being exercised by the county officers. It may be appropriate to say here, that the acceptance and approval by the proper county officer of an official bond, is held in most of the states to be a ministerial duty and that in a proper case its performance may be compelled by *mandamus*. In a case of this character, the supreme court of Pennsylvania said: "Until the title of the relator is avoided, it is good against all. He is authorized to enter upon the performance of the duties of the office, and the common council cannot delay him by declining to approve his sureties if

sufficient. A pending contest is nothing to this question. Let a peremptory *mandamus* issue as prayed for.”¹ In this case, it will be observed, the refusal to act upon the bond of the officer was based upon the fact that there was a contested election, the relator being returned as elected, and his competitor claiming the office. The same rule applies, however, in other cases. The officer is entitled to have his bond approved if it is sufficient, and in any case to a decision of the question; the tribunal has only authority to reject it because in their opinion it is insufficient, and not for any other reason.

§ 321. Official bonds of officers of municipal corporations.—The organization of municipal corporations which derive their powers from charters is usually less simple than that of counties and townships which are only *quasi* corporations rather exercising delegated powers as the agents of the state than operating in the more independent manner of the actual municipal corporation. In many of the larger cities of the United States, the powers vested in the municipal authorities by their charters are very extensive, and such a city is really an *imperium in imperio*. Ample authority to exercise within the corporate limits, what is known as the “police powers” of the state, to preserve peace and order, to secure property, to abate nuisances, and in many other respects to subserve the welfare of the community, is committed to the municipal officers. In the matter of official bonds there is little variation between those of municipal, and those of other officers. They are invariably required of all officers to whom is entrusted the collection and custody of public money, and usually of others who, in the discharge of their ordinary duties, may possibly or probably affect injuriously the personal or property rights and

¹ Commonwealth v. City Council of Philadelphia, 7 Am. Law Reg. (N. S.) 362.

interests of private citizens. It may be repeated here, that statutes providing for the execution of official bonds are generally directory in their character, and consequently, officers who are dilatory in taking the oaths and furnishing the bonds prescribed by such statutes, escape the forfeiture of office which frequently attaches to a strict construction of mandatory statutes,¹ and this rule is as fully applicable to the officers of municipal corporations, as to those of the state or county.

And as it is a bad rule that will not work both ways, it is equally true that the negligence and delay of an officer in furnishing his bond in due season, while it will not *per se* vacate his office (in the absence of a peremptory statute to that effect), will not relieve his sureties from the liability which they incur by signing his bond executed after the prescribed period. His negligence in this respect is his wrongful act, and it is no more competent for his sureties to take advantage of it, than for the delinquent officer himself.² This rule, too, it will be observed, applies as well to municipal, as to other bonded officers.

§ 322. Limitation upon powers of municipal corporations—Bond of officer which was not required by statute—Other irregular bonds.—It has already been said that the powers of a municipal corporation depend wholly on its charter, and must be derived from it either directly or by fair implication. Among other disabilities, such a corporation, although it may be endowed with *quasi* legislative powers, authorized to enact by-laws, ordinances, and orders covering a great variety of subjects, cannot

¹ *Smith v. Cronkhite*, 8 Ind. 134; *State v. Findlay*, 10 Ohio, 51, 59, and cases cited. See, also, *State v. Porter*, 7 Ind. 204; *Sprowl v. Lawrence*, 33 Ala. 674; *Bank v. Dandridge*, 12 Wheat.(25 U. S.) 64; *United States v. Le Baron*, 19 How.(60 U. S.) 73; *s. c.*, 4 Wall. (71 U. S.) 642.

² *State v. Tromer*, 7 Rich. (S. C.) L. 216. See, also, *Olney v. Pearce*, 1 R. I. 292.

create an office. Unless the charter expressly vests in the corporation or its common council, the power to create the office, an ordinance to that effect is *ultra vires* and void. Nevertheless when a common council did proceed to create a new office, "collector of assessments for street improvements," and appointed a person to fill that office, and he gave a bond conditioned that he would "well and truly pay the treasurer of said city all moneys which he might collect and receive as such collector as aforesaid," he was held to be a *de facto* collector, although in a proper legal sense there was no such office as he professed to fill, and his sureties were estopped by their bond from denying that there was such an office as "collector of assessments for street improvements," and that their principal was such a collector. The court says: "The fact that bonds are not prescribed by law does not necessarily invalidate them, although given by a public officer as a security for the discharge of his duties, if they are not unlawfully exacted of him; if voluntarily given they are binding upon the parties to them."¹

The ruling in the case just cited is based as much upon the propriety of protecting public interests by holding valid in all proper cases bonds voluntarily given for the benefit of the public, as upon the pure, hard doctrine of estoppel. It may as well be justified by the rule that instruments must be so construed *ut res magis valeat quam pereat*, and that in the construction of an obligation, it shall be taken most strongly against the obligor. Upon the same principle where there was an unimportant variation in the description of the obligee of an official bond, the supreme court of New York (1829) held that the bond of a constable *may* be given to the people, though it is not

¹ Hoboken *v.* Harrison, 30 N. J. L. 73, 78; citing, Woolwich *v.* Forrest, Pennington (N. J.), 115; United States *v.* Tingey, 5 Pet. (30 U. S.) 129; Tyler *v.* Hand, 7 How. 48 U. S.) 581; United States *v.* Bradley, 10 Pet. (35 U. S.) 361.

deemed necessary that it should be thus executed, and no matter in what form the constable may give his bond or instrument in writing to insure the faithful discharge of his duties, any person to whom he has become responsible on account of an execution delivered to him for collection, may sue upon such bond or instrument in writing, without first obtaining leave to prosecute such a suit.¹ These rulings are founded upon old statutes long since materially modified, but the doctrine they sustain is still in full force; that when the statute in prescribing an official bond gives no particular form, the bond is sufficient if the condition complies substantially with the statute.

And in another old case the rule is laid down that a bond varying from the form prescribed in the statute is good, if it contains in substance every thing that the law requires, and nothing which is not so prescribed. It would have been otherwise, however, if the statute had declared that a bond in any other form than that prescribed, should be void.²

§ 323. Who may bring suit on an official bond executed by an officer of a state. — It is usually provided in statutes authorizing official bonds to be required of state, county, or municipal officers, that suits may be brought upon them in the name of the official obligee "upon the relation" or "to the use" of the party injured by the breach of the bond or interested in its enforcement. Whenever, however, this express provision is omitted in the statute itself the deficiency is supplied by the construction given to such statutes by the courts whenever a proper case for such a ruling is presented. In a Maryland case (1858) the court held that it was not necessary for a plaintiff before instituting a suit

¹ *People v. Holmes*, 2 Wend. 281, 282; *Warren v. Racey*, 20 Johns. 74. See, also, *Dutton v. Kelsey*, 2 Wend. 615.

² *Alleghany v. Van Campen*, 3 Wend. 49; *Strong v. Tompkins*, 8 Johns. 98.

upon an official bond payable to the state, to obtain the state's permission to do so; and this although there was in the statute which prescribed the bond no specific provision for making the bond payable to the state, or for giving the party interested the right to sue upon it. The court adds, however, that: "There is no doubt that it is incumbent on the party suing on the bond, to show that he has an interest in it, before he could recover in a regular trial prosecuted to verdict."

The *rationale* of official bonds is well expressed by the court in this case: "The laws which provide for the execution of bonds similar to the one before us, do not require them for the purpose of protecting the rights of the state alone. They are also designed to secure the faithful performance of official duties, in the discharge of which individuals and corporations have a deep interest, and, therefore, they should have the privilege of suing such bonds for injuries sustained by them, through the negligence and misconduct of the officers."¹

§ 324. Various rulings on the subject of official bonds of state officers.—There have been many rulings in each of the states on the official bonds of state officers and the statutes by which they are required. As these decisions depend chiefly on the construction of state statutes, they are not of such general interest as would justify full and detailed consideration in these pages, but will receive such attention as their respective importance may seem to require. Thus in Georgia the statute requiring a sheriff's bond to be executed and accepted within thirty days after his election; his bond voluntarily given after the lapse of

¹ State, use, etc., *v.* Norwood, 12 Md. 177, 194; citing, Kersted *v.* State, 1 Gill & J. 248; McMechen *v.* Mayor, etc., 2 Harr. & J. 41; McMechen *v.* Mayor, etc., 3 Harr. & J. 534; Corporation, etc., *v.* Young, 10 Wheat. (23 U. S.) 406; Ing *v.* State, 8 Md. 294; State *v.* Dorsey, 3 Gill & J. 92; Laurenson *v.* State, 7 Harr. & J. 839.

thirty days was adjudged bad as a statutory, but good as a common-law and voluntary bond.¹ And in the same case it was held that a bond payable to an officer by his name and official addition, passed by succession to the successor of the obligee without assignment, it being regarded as made to the office and not to the person of the incumbent. And further the rule is declared as in accordance with the law of that state, that an official bond which does not conform to the statute, is good as far as it does conform unless the statute provides in express terms that such bonds shall be void. This, it will be observed, is in accord with the general law as elsewhere shown.

On a bond of the character above indicated, only one recovery can be obtained. Indeed, it may be said that all privileges and special remedies conferred by law upon official bonds and persons entitled to avail themselves of such bonds, as repeated recoveries, judgments by motion, and other summary proceedings, are limited to strictly official and statutory bonds, and this forms one of the most material distinctions between statutory and common-law bonds.²

It has been recently held in Missouri that a bond executed by an officer, clerk of a county court, by virtue of which he obtained the position and exercised the functions of that office, is binding upon him and his sureties, although it does not contain all the conditions which the statute prescribes. Even if it is so far defective that it cannot be regarded as a statutory bond, it is nevertheless good as a voluntary common-law bond and may be enforced as such. And the court added that the conditions in the bond that the "said O' Gorman shall discharge all the duties of clerk of the county court * * * in accordance with law," was

¹ Stephens *v.* Crawford, 1 Ga. 574; 44 Am. Dec. 680. See, also, Crawford *v.* Howard, 9 Ga. 314.

² Stephens *v.* Crawford, 3 Ga. 499. See, also, Sutherland *v.* Carr, 85 N. Y. 105.

broad enough to require of the clerk the performance of every duty which the law cast upon him as county clerk as fully as if they been specifically set forth in the bond.

This case is cited merely because it is the latest adjudication of a principle which is abundantly established by numerous authorities elsewhere cited. It tends to establish no new doctrine, but merely adds authority to well established principles.¹

§ 325. Same subject continued. — Whether the sureties of an officer are liable for a specific act depends, of course, upon the question whether the act is official or personal. If it is personal it is well settled that they are not so liable, but if it is official it is equally clear that they are. There have been many rulings upon this subject in cases in which the liability of the surety depended upon the official character of the act with which their principal is charged. Among the latest of these decisions is one in Nebraska, that the receipt of money by the clerk of a court of record, if it is in satisfaction of a judgment in his court, is an official act, even if such payment be made voluntarily, and *a fortiori* a payment made to such clerk by the sheriff, of money collected on execution, imposes an official obligation on the clerk and his sureties. They are liable on their bond for money so received by their principal.²

Whether the obligors of an official bond are chargeable with any liability created by virtue of a law enacted after the execution of the bond has been elsewhere considered. There have been numerous and somewhat contradictory decisions upon the subject, and the rulings have been made dependent upon several distinctions and differences. In Ohio the rule is very clearly and curtly settled in a recent

¹ State *v.* O'Gorman, 75 Mo. 370, 378; citing, State *v.* Thompson, 49 Mo. 188; Gathwright *v.* Callaway Co., 10 Mo. 663.

² McDonald *v.* Atkins, 13 Neb. 568.

case. The supreme court says; in effect, that one who holds office and gives bond, undertakes to discharge his duty "according to law;" that that phrase includes all statute law in force during the obligor's term of office, whether enacted before or after the execution of the bond.¹

In Michigan the supreme court has not gone as far in this direction as in Ohio. In a recent case the court decided that the official bond of a county treasurer, which requires him to account for "all moneys which shall come to his hands as treasurer," included the liquor tax money, which was no part of the county funds, and that the bond was not restricted as a security to the moneys received for the county, but included the whole range of the treasurer's official duties. And further, the court said, that the fact that the liquor tax law was passed after the statute which prescribed the terms of the treasurer's bond, in no respect relieved the treasurer or his sureties from the liability imposed by the liquor tax law upon the county treasurer. The latter law, however, it may be remarked, was in force when the bond was given.²

§ 326. Liability for interest, of officer and his sureties.—As a general rule the custodian of public money is not chargeable with interest while the funds are in his hands, but when it becomes his duty to pay the money to his successor or to another officer, his liability for interest at once accrues. Thus, a county treasurer who fails at the required time to account for sums remaining in his hands, is liable for interest on the amount from that time, and such interest should be included in the damages when judg-

¹ *Dawson v. State*, 38 Ohio St. 1; citing and approving *King v. Nichols*, 16 Ohio St. 80. See, also, *McKee v. Griffin*, 66 Ala. 211.

² *Marquette Co. v. Ward*, 50 Mich. 174; citing, *People v. Supervisors*, 30 Mich. 388; *Marquette v. Treasurer*, 49 Mich. 244.

ment is rendered against him and his sureties on his official bond.¹

§ 327. Rule as to officer's duty to deposit money in bank. — It has been elsewhere said that the breach of an officer's bond with reference to money which he may have officially received, occurs when he fails to perform the duty incumbent upon him as to the legal disposition of the funds. If it is his duty simply to keep the money he is manifestly in no default as long as he keeps it; but when it becomes his duty to pay it to some other person, or to deposit it in bank, his failure to do so is a breach of his bond. And in South Carolina, in a recent case, it has been decided that it being, by statute, the duty of a clerk of a court to deposit *immediately* in a bank all moneys officially received by him, his retention of such money was a default, and a continuing default, which rendered liable the sureties on an additional bond executed after the original default was committed, as well as those upon the first bond.²

§ 328. Official bond — When and where a condition precedent to tenure of state office. — Whether the execution and acceptance of an official bond is a condition precedent to the tenure of office is a matter regulated by statute in most of the states. In Georgia it is the law that a county treasurer must give a bond with security, and that the bond shall be approved before he becomes entitled to enter upon the duties of his office. Upon this principle it was decided that a judgment against an (alleged) county treasurer in favor of the county, and an execution against him were both void as against a junior individual execution creditor of the alleged treasurer. The treasurer having

¹ Supervisors *v.* Clark, 92 N. Y. 391; citing, Supervisors *v.* Birdsell, 4 Wend. 453.

² State *v.* Moses, 18 S. C. 366; citing, Treasurers *v.* Taylor, 2 Bailey, 524.

given no bond was not treasurer at all, and the execution against him as such was void.¹

§ 329. **Surety on constable's official bond not liable (in New York) for seizure by his principal of the property of one person by virtue of an execution against another.** — In a very recent case in New York (October, 1883), the question arose whether the sureties on the official bond of a constable were liable for the seizure by their principal of the property of one person by virtue of an execution against another. The bond was in the form required by the laws in force before the revised statutes were amended by chapter 788 of the laws of 1872. The condition alleged to have been broken, and to furnish the cause of action, was that the obligors should pay "all such sums of money as the constable may become liable to pay on account of any execution which shall be delivered to him for collection." This condition, as the court very properly observes, does not cover the whole range of the constable's official duties, nor is it an indemnity against all his possible official delinquencies. The constable may neglect to levy or return an execution, or having collected the money, may fail to pay it over, and in other respects may violate the rights or injure the interests of the plaintiff, and for such misconduct his sureties on a bond of this description would be liable. But where he commits a bare trespass, although he may be acting under color of legal process, he cannot be said to have incurred liability to a third person "on account of the execution." That process was a mere incident or circumstance attending the trespass. It will be observed that in this ruling the court founds upon the very special and limited language of the bond, and distinguishes the case from that of the People *v.* Schuyler, 4 N. Y. 173. That case has been elsewhere cited and discussed, but it may be here remarked that in

¹ *Foster v. Justices, etc.*, 9 Ga. 185.

it the court distinctly decides that the seizure by an officer of the property of one person under color of legal process against another, is official misconduct, for which he and his sureties may be held liable for damages in an action of trespass, and if the official bond is conditioned for "the faithful performance of the duties of his office," as all such bonds should be, the trespass is a breach of it, and will sustain an action against the officer *and* his sureties.¹

§ 330. Official bonds prescribed by state authority similar in their incidents to other official bonds.—This chapter may be appropriately closed with the remark that as a rule the same principles, distinctions, and decisions, which apply to official bonds prescribed by state statute and required of state, county, township, and municipal officers, are equally applicable to official bonds exacted from officers of every description. It would, therefore, be useless and improper to repeat here the various rulings upon these subjects which have been fully discussed elsewhere. It will be sufficient therefore to say, that whatever may be said in the other chapters of this work with reference to the penalties of official bonds, actions upon them, summary remedies, pleadings, evidence, and the broad subject of suretyship, is as fully applicable to bonds of the kind now under consideration as to those of any other description. Wherever a distinction is taken, or a difference made in the application of a principle, by the special character, or description of the bond under consideration, such distinction or difference is carefully noted. Indeed, it may not be too broad an assertion to say that, with rare exceptions, the same kind of liability is incurred by the obligors in all official bonds, no matter by what authority such bonds may be prescribed.

¹ *People v. Lucas*, 93 N. Y. 585; citing, *Sloan v. Case*, 10 Wend. 370; 25 Am. Dec. 569; *People v. Schuyler*, 4 N. Y. 173. By the ruling in the first named of these cases, that of *People v. Lucas*, 25 Hun, 610, is reversed. See on this subject *Lammon v. Fausier*, 111 U. S. 17 (1883), and cases therein cited.

CHAPTER X.

OFFICIAL BONDS PRESCRIBED BY STATUTES OF THE SEVERAL STATES—BONDS OF EXECUTORS, GUARDIANS, ADMINISTRATORS, AND TRUSTEES.

SECTION 340. Bonds, other than those of officers prescribed by state statutes.

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344. The bonds of administrators.
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346. Bonds of administrators with the will annexed.
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348. Guardians who do not give bond and security.
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361. Rule as to release of sureties on the bond of a guardian, and the exaction of a new bond.
362. Jurisdiction of courts to appoint guardians—Appointment of guardian by a court without jurisdiction invalid, and bond void—Rights of sureties.

- SECTION 363. Sureties of guardian—When entitled to subrogation to rights of ward.
364. Rights of sureties of guardian—When subordinated to homestead right.
365. When a cause of action accrues upon the bond of a guardian—Statute of limitations.
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367. Guardian's general bond—Special bond for proceeds of real estate sold—Effect of new bond—What it covers.
368. Duty of guardian when ward arrives at the age of twenty-one years—Liability of sureties—Laches.
369. Bonds of guardian in one state executed with reference to the laws of another state.

§ 340. **Bonds, other than those of officers, prescribed by state statutes in general.** — Of bonds prescribed by state statutes, other than the official bonds of the persons holding public offices and discharging public duties, there are two kinds. First, the bonds required of *quasi* public functionaries, discharging duties which involve chiefly and primarily, private interests, but acting continuously under judicial control and supervision ; and, secondly, such bonds as are required of litigants, and others upon occasions which arise in the course of legal proceedings.

To the consideration of the former of these two classes, this chapter is devoted. The latter class of bonds will be treated in the next.

§ 341. **The bonds of executors.** — In England and (in the absence of statutes) in America also, the rule is that an executor is but a bare trustee in equity, and if he be insolvent, he will be treated as any other trustee and required by a court of chancery to give bond and security before he will be permitted to execute the trust.¹ The poverty of the executor, however, when there does not appear any change for the worse, after the death of the testator, in his credit or circumstances, will not authorize a court

¹ *Rous v. Noble*, 2 Vern. 249; *Batten v. Earnley*, 2 P. Wms. 163; *Slanning v. Style*, 3 P. Wms. 336. See, also, *In re Wadsworth*, 2 Barb. Ch. 881.

against the will of the testator to remove the executor and put a receiver in his place. There must be in addition, some maladministration, or some danger of loss from the misconduct or negligence of the executor, for which he will not be able to answer by reason of his insolvency. Under these circumstances a court is justified in requiring an appropriate and adequate bond, or in default thereof, in removing the executor, and committing the estate to the charge of a trustee or receiver. Unless a case of this character is made out, and it is shown that the trust fund is in jeopardy, not merely from the poverty of the executor, but from his fraud or mismanagement, a court is not empowered to abrogate the disposition which the testator has made of his estate, displace his chosen trustee, and install a stranger in his place.¹ It would be arbitrary as well as unjust, for a court to adjudge that a person of adequate capacity to make a will, had not sufficient judgment to select a trustee to manage his estate as executor.² The statute of New York, gives the surrogate power to require a bond of an executor, when his circumstances are "precarious," and the court holds that to bring a trustee within the operation of that statute, there must not be merely poverty, but improvidence and recklessness in the management of the trust fund, or the trustee's own property.

§ 342. Same subject continued. — In most of the American states there have been enacted statutes which require executors to give bond and security for the faithful performance of their trusts, before letters testamentary can be issued to them.³ In general this rule is imperative, and

¹ *Fairbairn v. Fisher*, 4 Jones (N. C.) Eq. 390. See, also, *Wilson v. Whitefield*, 38 Ga. 269; *Wilkins v. Harris*, 1 Wins. (N. C.) 41; *Bowman v. Woolton*, 8 B. Monr. 67; *Shields v. Shields*, 60 Barb. 56.

² *Shields v. Shields*, *supra*.

³ See the statutes of the several States on this subject; and see, also, *Cowling v. Nansemond Justices*, 6 Rand. 349; *Webb v. Dietrich*, 7 Watts & Sergt. 401; *Cohen's Appeal*, 2 Watts, 175; *Bankhead v. Hubbard*, 14 Ark. 298; *Holbrook v. Bentley*, 32 Conn. 502.

any exception must be founded upon an express exemption of the executor from the necessity of giving security embodied in the will itself. In other states bonds are required of executors only when it appears to be necessary for the estate.¹ And in any case, if an executor gives a bond under a statute, which requires it either as a proceeding in due course, or upon the requisition of the tribunal to which he is responsible, and his bond shall be deemed to be insufficient he may be compelled, upon proper application, to furnish additional security.² But the additional security can only be required by the same court which originally issued his letters testamentary.³ The scope and operation of an executor's bond is limited to the jurisdiction of the state in which it was executed, and the surety on such a bond is only liable for the assets for which his principal had become responsible within that state.⁴

It has already been said that an executor will be exempted from giving a bond, if the testator so orders or requests in the will itself. It may be added that if, notwithstanding the exemption he does give a bond, he and his sureties are liable upon it, and if two co-executors, being thus exempted from the duty of giving a bond, do, nevertheless, give a joint and several bond with the usual conditions, they are mutually liable for the acts of each other.⁵ And if an executor gives a bond without security and complies in other respects with the statute regulating bonds of that character, his bond is an executor's bond, and entitles

¹ *Mandeville v. Mandeville*, 8 Paige Ch. 475. See, also, *Wood, v. Wood*, 4 Paige Ch. 299; 38 Am. Dec. 451; *Colegrove v. Horton*, 11 Paige, 261; *Holmes v. Cock*, 2 Barb. 436; *McKenna's Appeal*, 27 Penn. St. 237; *Powell v. Thompson*, 4 Dessaus. 162; *Shields v. Shields*, 60 Barb. 56.

² *Kelcrease v. Kelcrease*, 7 How. (Miss.), 311; *Ellis v. McBride*, 27 Miss. 155.

³ *Atkinson v. Christian*, 3 Gratt. 448.

⁴ *Fletcher v. Weir*, 7 Dana, 349; *Governor v. Williams*, 3 Ired. L. 152; 38 Am. Dec. 712; *Normand v. Grogan*, 17 N. J. Eq. 425.

⁵ *Ames v. Armstrong*, 106 Mass. 15.

him to the defense of the statute of limitations, which restricts the bringing of actions against him to a certain period after the executor had filed his bond.¹ Whether an executor, exempted by the terms of the will from the necessity of giving bond and security, could be required by a court to furnish such security in any case, was doubted in Kentucky; but, if it could be done at all, it could only be upon the showing that the executor was less responsible than he was when the will was proved.²

§ 343. Same subject continued.—In a later case in Kentucky it was held that under the statute then in force a bond might be required of an executor who was exempted from giving one by the will, provided such a bond was demanded by a person interested in the estate, or was, in the opinion of the court, acting upon its own motion, necessary or expedient.³ In Mississippi the rule seems to be that an executor, exempt by the terms of the will from the necessity of giving bond and security, may be required to give such security, if the court has good reason to suspect the executor of fraud or maladministration.⁴ And in this connection it may be said, and the rule applies as well to administrators as to executors, that whenever a bond has been taken from a trustee of either description, and circumstances occur by which it becomes inadequate or insufficient, the court which required the first bond, may exact an additional bond to cover the new responsibility; as for example, an administrator who has given bond to cover

¹ *Wells v. Child*, 12 Allen, 830; citing, *Langton v. Atkins*, 1 Pick. 547; *Marcey v. Marcey*, 6 Metcf. 367; *Arnold v. Sabin*, 1 Cush. 530; *Abercrombie v. Sheldon*, 8 Allen, 532. In this last case, however, the executor was not regarded as entitled to the benefit of the statute of limitations, because he had not given the notice which the statute expressly directs to be given, and upon which the limitation of the right of action depends.

² *Bowman v. Wootten*, 8 B. Monr. 67.

³ *Atwill v. Helm*, 7 Bush, 504.

⁴ *Clark v. Niles*, 42 Miss. 460.

personal assets, and afterwards obtains leave to sell land to pay debts, may well be required to furnish an additional bond. This is regulated by statute in most of the states, as in Massachusetts,¹ but irrespective of statute the power to control executors and administrators in this respect is inherent in the courts from which they derive their powers, and to which they must account for the exercise of such powers. They are *quasi* officers of the courts, and must act in accordance with their orders.

§ 344. The bonds of administrators. — Unlike executors, administrators are universally required to furnish bonds and security for the due performance of the duties which they assume. By the statute of 21 Henry VIII., Ch. 5, § 3, the ordinary was directed to take surety of him or them to whom administration should be granted, and later statutes on the same subject, were from time to time enacted, the series terminating in the act 20 and 21 Vict., Ch. 77, which amended and consolidated the law on the subject. The details of that statute it is unnecessary to repeat here.

It is sufficient for the purposes of this work to say, that in England as well as in America, wherever letters of administration are granted on the estate of any deceased person, the administrator must give a bond with security in a penalty corresponding with the value of the estate committed to his charge, and conditioned for the due discharge of his duties as administrator.

The reason of the distinction between the two classes of trustees, is obvious enough. The executor is the chosen agent of the testator, and the law will not intervene to thwart the wishes of the owner of property even after his death, unless justice to the living imperatively requires such interference. The administrator on the contrary,

¹ *Hannum v. Day*, 105 Mass. 38; *National Bank, etc., v. Slanton*, 116 Mass. 438.

bears no fiduciary relation to the deceased, is not his choice nor trusted by him. He is a mere officer, a trustee only by virtue of positive law, empowered to act by official persons with whom the deceased had no privity, and over whom the distributees and creditors can exercise no control. Of course, therefore, like all other persons entrusted by operation of law with the custody and control of money and property not their own, administrators are required to furnish security for the due discharge of their duties and the safety of the funds committed to their charge.

§ 345. Bonds to pay debts and legacies. — In some of the states it is the law that if the executor named in the will be the residuary legatee, he may give bond conditioned to pay debts and legacies only, and not in the common form prescribed by the statute. Such a bond exempts the executor from the necessity of returning an inventory, but it conclusively admits assets sufficient to pay all debts and legacies, so that if there be any doubt of the sufficiency of the estate to answer all demands that may be made upon it, the bond in the common form is clearly safer.¹ In one case the court says: “As many persons have been ruined by giving bonds in this form, we think it the duty of judges of probate always to discourage this kind of security, and to take special care that no such bond is received in any case where it is not beyond a doubt that the estate is solvent.”² There seems to be a very scant temptation to depart from the ordinary formula and commit oneself to the liability of answering an indefinite indebtedness.

§ 346. Bonds of administrators with the will annexed. — In common with other administrators, those who

¹ *Colwell v. Algér*, 5 Gray, 67, 68. See, also, *Jones v. Richardson*, 5 Metc. 247; *Clark v. Tufts*, 5 Pick. 337; *Morgan v. Dodge*, 44 N. H. 262; *Duvál v. Snowden*, 7 Gill & J. 430; *Stebbins v. Smith*, 4 Pick. 97.

² *Morgan v. Dodge*, 44 N. H. 262.

execute wills when the executors have declined to act, must give the ordinary statutory bond. In Massachusetts, the administrator with the will annexed, if he be also residuary legatee, enjoys the very equivocal privilege of giving a bond to pay debts and legacies.¹ In other cases the bond of an administrator with the will annexed corresponds with that of an executor as the duties of the two trustees are identical; to execute the will of the testator, and to account to the appropriate tribunal for the manner in which he has discharged the duties required at his hands.²

§ 347. The official bonds of guardians in general.— In the United States, as in England, guardians for infants may be appointed by will, and the testator may, within the limits prescribed by law, control the action and define the powers of such guardians over the person of the infant and his property, provided, of course, the infant is the child of the testator; otherwise the operation of testamentary directions to the guardian, if operative at all, is limited to the property committed to the charge of the guardian. And a testator may exempt a guardian appointed by his will from the necessity of giving bond and security, to the same extent and in the same manner, and subject to the same limitations, as in the case of an executor. If not exempted from the necessity of giving bond and security, testamentary guardians are required to furnish bond and security in precisely the same manner as if they derived their powers from the courts which have, in the several states, jurisdiction of the subject.

In each of the states the control of the subject of guardianship, is committed to a court of probate, or a county

¹ Mass. Stat. 1870, Ch. 285.

² On this subject generally, see *Ex parte Brown*, 2 Bradf. Sur. 22; Commonwealth *v.* Rogers, 53 Penn. St. 470; McKennan's Appeal, 27 Penn. St. 237; Small *v.* Commonwealth, 8 Penn. St. 101; Johnson's Appeal, 12 Serg. & R. 317.

court exercising probate and ordinary jurisdiction, or other tribunal of that character, and that court appoints the guardian, fixes the penalty of the bond (the condition being prescribed by statute), passes judgment upon the sufficiency of the sureties, and having approved and accepted the bond, issues letters of guardianship. In some of the states courts of chancery exercise, under certain circumstances and in proper cases, supervisory powers over guardians appointed by the courts of ordinary jurisdiction,¹ and this jurisdiction, though usually exercised with reference to the person of the infant, is not limited to it, but will be exercised to the extent of removing a guardian appointed by another court, if the interests of the infant require such removal.²

§ 348. Guardians who do not give bond and security.—Testamentary guardians, as already stated, may be exempted by the terms of the will from the necessity of giving security for the proper discharge of their duties; but they also may, if the welfare of the infant requires it, be subjected to the discipline of the court of chancery, which will in proper cases remove them, rule them to security, or otherwise secure the interests of their wards. There are other guardians who, under certain circumstances, act without being required to give security. Usually, however, their functions are merely formal, as guardians *ad litem*, whose action is under the immediate supervision of the court by which they are appointed. In New York, however, even a guardian *ad litem* must give bond and security, unless he is a clerk or register of the court who has given security for the performance of his official duties generally.³

¹ Wilcox v. Wilcox, 14 N. Y. 575; Cowles v. Cowles, 8 Ill. 435.

² Cowles v. Cowles, 8 Ind. 435.

³ Minor v. Betts, 7 Paige, 596.

§ 349. Requisites of a guardian's bond. — As a general rule the penalty of the bond of a guardian should be double the value of the personal estate of the ward, including the income of the realty for the whole time that the minority will continue; and it is the duty of the court to cause the sureties to justify in at least the amount of the penalty of the bond.¹ Where, however, the estate of the infant is very large, courts of chancery have relaxed the rule which requires the surety to justify in the full amount of the penalty (double the estate) and accepted a justification in a less but sufficient sum.²

§ 350. The approval of the guardian's bond a condition precedent to his right to act. — It is usual under the statutes of the several states for the court which appoints a guardian to issue to him letters of guardianship which should recite his appointment, qualification, bond, and other prerequisites to his official position. These letters, however, constitute mere matter of evidence, as the authority of the guardian to act is derived from his appointment and bond.³ If, however, the clerk of the court takes it upon himself to issue letters of guardianship before any bond is given or approved, such letters are merely void, confer no power upon the alleged guardian to interfere with the person or property of the infant or to act in any respect as guardian. As already intimated the execution, delivery, and approval of the guardian's bond constitute a condition precedent to his appointment, and his appointment is his sole authority to act as guardian. It is immaterial whether the formal letters of guardianship are issued at all. Consequently the sureties of a clerk of a probate court incurred no liability on their official bond, because their principal issued letters of guardianship before any bond was filed or approved. As

¹ *Bennett v. Byrne*, 2 Barb. Ch. 216.

² *Matter of Hedges*, 1 Edwd. Ch. 59.

³ *Maxon v. Sawyer*, 12 Ohio, 195.

the letters so issued were null and void, they imparted no legal authority to the (so-called) guardian to interfere with the estate of the infant, and the supreme court of Ohio held that under the strict construction of their obligation, to which sureties are always entitled, they incurred no liability because their principal issued to the guardian what was, in legal effect, a blank piece of paper. He did nothing *by virtue* of his office by reason of which his sureties could be charged; whether they were liable on the ground that he was acting *under color* of his office, is a question which was not made in the case nor decided by the court. Nor did the court decide whether the clerk was or was not personally responsible to any person who might have been misled to his injury by the action of the clerk in issuing the paper without authority.¹

§ 351. Accepting and approving the bond of a guardian is a judicial act — Evidence of authority to act as guardian. — In an old case in Virginia it has been held that taking and approving the bond of a guardian is a judicial, not a ministerial act. The law at that time in that state, as at this day in many others, required the bond to be executed in open court, and that it should be approved by the court. Consequently the clerk of the court was not liable on *his* official bond for failing to take the bond of a guardian appointed by the court.² And in Maryland the fact that a guardian has executed his bond and qualified as guardian can only be established by record evidence, the presentation of the bond itself, or an office copy of it.³

§ 352. Rule as to the bond of a feme covert guardian. — A married woman may become a guardian, and it is necessary

¹ Carpenter *v.* Sloane, 20 Ohio, 327, 331. See, also, Perry *v.* Brainard, 11 Ohio, 442; Este *v.* Strong, 2 Ohio, 451.

² Page *v.* Taylor, 2 Munf. (Va.) 492.

³ Clark *v.* State, 8 Gill & J. 111.

not only that she should be a proper person to be entrusted with the custody of the infant and his property, but that her husband should also be unexceptionable, for his marital influence may well be expected to control in a great measure the action of his wife so far as relates to her trust. And in a state in which one surety is sufficient to satisfy the requirements of the law, the husband cannot be that sole surety unless his fortune is large.¹

§ 353. When judge becomes personally liable for misconduct in accepting guardian's bond. — The general rule that judicial officers are not personally liable otherwise than by way of impeachment, or equivalent proceeding for misconduct in office, is subject to an exception in Kentucky in favor of infants with reference to the bonds of their guardians.² By statute in that state it is provided that "if the court fails to take such covenant, or accepts such person or persons for surety as do not satisfy it of their sufficiency, the judges present and so in default, shall be jointly and severally liable to the ward for any damage he may sustain thereby." Construing this statute the court says, that under it the judge is required, while sitting as a court, either to have personal knowledge of the sufficiency of the surety, or else to institute a judicial investigation into his circumstances. It may be presumed, although it is not so decided, that if the official scrutiny so instituted results in the conviction that the surety offered is adequate, the judge will be held blameless if the surety afterwards proves to have been insolvent. The court does not decide, nor does the statute declare whether, if the judge acts upon his own personal knowledge of the surety's affairs he assumes the position of insurer. It would be manifestly impossible for any court to decide what the judge, who might prove to be mistaken in such a case knew, or did not know. It is

¹ *Ex parte Maxwell*, 19 Ind. 68.

² 1 Rev. Stat. (Stanton) 574, Art. 1, Ch. 43, § 4.

believed that there is room for a little further legislation on this subject.¹

§ 354. Guardian's bond valid although in artificially drawn. — In common with other obligations of like character, the bonds of guardians receive a liberal construction as to defects of form. Thus, where a bond was made payable to "Joel Allen, judge of probate," instead of the "probate court" as the statute prescribed, the bond was held good.² And in other respects, bonds of this character fall within the rule, that obligations which contain more than the law requires are good as far as they comply with the law, and void only as to the unauthorized portions. And so of bonds in which matter prescribed by statute is omitted. They are held to be good as far as they go.³ And if in a bond the name of the ward is inserted in the wrong place, the bond being nevertheless intelligible, the guardian and his sureties are bound upon it.⁴

§ 355. What constitutes a breach of a continuing bond. — A continuing bond is one by which the officer or principal obligor is not bound to pay over funds in his hands at a fixed time or within a reasonable time after its receipt, or during the continuance of his trust, upon the requisition of superior authority. It is the duty of such a trustee to hold such funds, until by the terms of the trust, or by operation of law, his trust is terminated. Thus a guardian may retain in his hands the *corpus* of his ward's estate as long as his ward remains an infant, or until he is denuded of his trust by a court of competent jurisdiction. When, therefore, such a court renders a

¹ *Colter v. McIntire*, 11 Bush., 565.

² *Probate Court v. Strong*, 27 Vt. 202; citing, *Master, etc., v. Davenport*, 1 Wils. 184. See, also, *Alston v. Alston*, 84 Ala. 15.

³ *Pratt v. Wright*, 13 Gratt. 175.

⁴ *State v. Sprinkle*, 69 N. C. 175.

decree requiring a guardian to pay over to his successor the money in his hands, a failure to do so constitutes a breach of *his* bond. If such a decree is rendered, and no appeal be taken, the decree is conclusive upon the guardian and his sureties, and no plea to an action on his bond can be made available, except a plea of payment.¹

§ 356. Testamentary trustee — Bond of, is a continuing obligation. — If a testamentary trustee be required by a court of competent jurisdiction to give bond and security for the faithful discharge of the duties of his trust, such a bond is an official bond of the class now under consideration, and the sureties upon it are liable according to its tenor and effect. In a Connecticut case of this character, the trustee had given a bond upon the requisition of a competent tribunal, conditioned for the faithful discharge of his trust, and subsequently another bond upon which the suit was brought. He filed in the probate court, a few days before the execution of the second bond, a statement of his account, showing the balance due by him to the trust fund. He was afterwards denuded of his trust, and the fund was found to have disappeared. It was held by the court upon this state of facts that, as it was the duty of the trustee to hold the fund during the whole term of his trusteeship, that the surety was not entitled to answer the obligee of the bond, representing the beneficiary, that the conversion might have taken place before the bond was given; that his default was not complete until he had failed to pay over the fund when duly and legally required to do so; that his was a continuing trust, which terminated only when he was finally removed from his office. The court further held that the account rendered by the trustee to the probate court was evidence of the liability of the trustee, and of the amount and description of the trust funds in his

¹ Commonwealth *v.* Gracey, 96 Penn. St. 70.

hands, and was evidence of these facts, as well against the surety as the principal.

In the opinion in this case the court distinguishes it with reference to the first point decided from those adjudged cases in which it was decided that a surety is not bound for acts or omissions of his principal accruing before the execution of the bond.¹ These cases, the court remarks, are cases of tax collectors, the duty of the principal being to pay over to the treasury or to some other officer the amount received, either at a fixed time, or within a reasonable time after its receipt. In such a case a failure to pay at the proper time is a default, presupposes a conversion of the fund, and is a breach of the officer's bond. In the case of a continuing trust it is otherwise. The trustee's duty is to hold the fund until he is required by competent authority to pay it over to his successor or other fiduciary. "If, therefore, he at any time retained any part of it in his own hands he became debtor to the fund with the continuing duty of either investing it, or upon his removal, delivering to his successor. His failure to do this is the completed default shown by the record, and is within the time and terms of the defendant's undertaking."²

§ 357. Testamentary guardians — When required to furnish bond and security. — It has already been said that at common law an executor is not required to give a bond and security for the faithful discharge of his duty. The statutes of the several states, however, have regulated this matter. In some of the states bonds are required of all executors who are not exempted from the duty of furnishing them by express testamentary provision. In others, they are required of executors only upon good cause shown by parties interested in the estate. The like practice pre-

¹ *Farrar v. United States*, 5 Pet. (30 U. S.) 373; *United States v. Boyd*, 15 Pet. (40 U. S.) 87; *Rochester v. Randall*, 105 Mass. 295

² *State v. Howarth*, 48 Conn. 207, 218, 217.

vails with similar diversity with reference to testamentary guardians.

In Pennsylvania, the rule is that because of the trust and confidence reposed in the executor or guardian by the testator, security will not be primarily required, yet whenever such circumstances are shown as require their interposition, courts will, in the interest of infants, or legatees, or creditors, require security to be given by executors or testamentary guardians.

The rule in that state is that the guardian must keep the money or property of his ward separate from his own; if he uses his ward's money in his own business, he will be charged interest and held to account for all profits made by such use of the trust funds in his hands, and required to submit to any loss which may occur in consequence of his deviation from his duty. And in such a case he may be removed.¹ When an application is made by the friends of an infant ward, the testamentary guardian will be required to furnish security, although he may be perfectly solvent and the owner of valuable real estate.² The rule thus stated as prevalent in Pennsylvania, is generally in force in the several states. Courts are usually sedulous in protecting the interests of infants, and lend a most indulgent ear to the representations of those who apply in their behalf.

§ 358. Appointment of guardian for deaf and dumb person — Estoppel of sureties by their bond. — In most of the states, if not in all, guardians may be appointed by the tribunal exercising probate or ordinary jurisdiction, not only for infants and lunatics, but also for persons incapable from physical infirmity of transacting their own business and taking proper care of themselves and their estates. Persons who are deaf and dumb are taken under the protection of the law in Ohio, and for them, although they may

¹ Green's Estate, 7 Philad. 502.

² Estate of Stanton, 13 Philad. 213.

be of full age, guardians are appointed whose duties correspond with those of the guardians of infants and lunatics. And the liabilities of the sureties on the guardian's bond are identical in such case with those of guardians of infants. The sureties are estopped by their bond from denying that their principal is guardian, that the ward is incapable in the manner and degree set out in the appointment of the guardian, and recited in the bond, and are in like manner precluded from denying any and all the other recitals of the bond.¹

§ 359. Defaults that will render a guardian's sureties liable—Continuing obligation.—In most of the states, the manner in which a guardian shall manage his ward's estate is prescribed by statute, and in some respects with minuteness. In Alabama and in Tennessee, a guardian can lend his ward's money upon a note or like obligation with two good securities. If he does this in good faith, and the principal and sureties all become insolvent before the maturity of the obligation (the length of time for which the loan may be made being limited by statute), he is exonerated from all loss. If, however, he fails to pursue the terms of the statute, loans the money without security, or with imperfect and illegal security, or for a period exceeding that prescribed by law, and a loss occurs, it falls upon him, and if necessary upon his sureties. This result is inevitable when the sureties act in bad faith and conspire with the guardian to get for themselves or their friends the use of the ward's money in violation of law. A very flagrant case of this character is reported in a late case (1880) in Alabama. Certain directors of a bank became personally the sureties of a guardian, he loaned his ward's money to the bank, taking as security its obligation with

¹ *Shroyer v. Richmond*, 16 Ohio St. 455, 467; citing, *Douglas v. Scott*, 5 Ohio, 198.

two (insolvent) sureties. The bank failed, and the court held that the sureties on the official bond of the guardian were liable, that the loan of the money by the guardian with insufficient and illegal security was a breach of his bond, and that his liability and that of his sureties, accrued at that moment, and that the bank in thus illegally borrowing the money from the guardian with full notice that he was guilty of a breach of his duty became a trustee *in invitum* for the wards.¹

§ 360. Guardian's bond irregular—When sufficiently in accord with the statute.—It is not essential that the bond of a guardian should strictly follow the terms of the statute. The law is reasonable in this respect, and exacts only a substantial compliance with the terms which it prescribes. Thus, under a statute which required of guardians a bond, "with sufficient sureties payable to the judge of probate, in the penal sum of twice the supposed estate of the *ward*;" a bond, otherwise sufficient, which a guardian of *several* wards had given to secure the performance of his duty to each and all of his wards, was held in Alabama to be sufficiently in conformity with the statute to be not merely good as a common-law bond, but valid as a statutory bond, the variation being regarded by the court as immaterial.²

§ 361. Rule as to release of sureties on the bond of a guardian and the exaction of a new bond.—In all the states there are statutory provisions by which the sureties on official bonds of guardians may procure a release or terminate their liability, if they have reason to apprehend loss. This is usually effected by a petition to the appropriate tribunal praying that the guardian be required to give a new bond and that the sureties on the existing bond be released. This is the law in force in Mississippi,

¹ *Lee v. Lee*, 67 Ala. 406.

² *Brunson v. Brooks*, 68 Ala. 248.

and in that state it is competent for the chancellor having jurisdiction of the subject-matter and of the parties, of his own motion and upon his personal knowledge, to summon the guardian to appear and give a new bond with good security. Under this law it was held that a bond tendered by a guardian, without either the requisition of his former securities, or a citation emanating from the chancellor, was a statutory bond when approved and accepted by the chancellor. The bond, when so accepted and approved, operated to release the sureties on the antecedent bond, from all responsibility for the acts of the guardian subsequent to the acceptance of the new bond, and to fix that liability upon the sureties on the new bond. It was not necessary, the court said, that the information upon which the chancellor might order the execution of the new bond should appear on the record, for of the existence of circumstances indicating the propriety or necessity of exacting a new bond he was the judge; it was not necessary that the guardian should be cited to appear, for he did appear voluntarily; it was not necessary that the chancellor should require, by a precedent order, the execution of the bond, for it was voluntarily tendered. "Neither he nor his sureties can now say that the bond is invalid because of the absence of the order, which he then waived by his conduct, *volenti non fit injuria*." A party cannot be permitted to controvert the existence of a jurisdiction, the exercise of which he himself has invoked. "From the fact that the bond was required, or approved and accepted, we must presume that a proper case was shown for the action. Where the power to determine exists and is exercised, it is to be presumed that the facts upon which the court acted were sufficiently established."¹

¹ *McWilliams v. Norfleet*, 60 Miss. 987, 994; citing, *Sayers v. Cassell*, 23 Gratt. 555; *Potter v. State*, 23 Ind. 550; *Sebastian v. Bryan*, 21 Ark. 447; *Elam v. Barr*, 14 La Ann. 671; *Cason v. Cason*, 31 Miss. 587; *Hutchins v. Brooks*, 31 Miss. 430; *Duncan v. McNeill*, 31 Miss. 704; *Cannon v. Cooper*, 39 Miss. 784; *Pollock v. Buie*, 43 Miss. 140.

§ 362. Jurisdiction of courts to appoint guardians — Appointment of guardian by a court without jurisdiction invalid and bond void — Rights of sureties. — The jurisdiction of probate courts, orphan's courts, county courts, and other tribunals over the appointment of guardians, and their power to require such guardians to give bonds and render accounts, is almost wholly regulated by statute in the several states. Of course courts of that character exercising powers conferred by statute, cannot assume jurisdiction beyond the limits prescribed by the statute, under which alone they are empowered to act, and their proceedings and adjudications unauthorized by law are utterly void. Thus, in 1859, as the law then stood in Mississippi the probate courts of that state had no authority to appoint a guardian for an infant whose father was living. A probate court, however, *did* appoint for such an infant, a guardian who qualified and gave bond and security. Upon being required to account, the guardian raised the question of the validity of his appointment, and the High Court of Errors and Appeals decided that the appointment, accounting, and subsequent proceeds were all *coram non judice* and absolutely void.¹ In 1883, suit was brought on the guardian's bond against the representatives of the principal and the sureties, and judgment rendered for the defendants. The court says: "When no action is maintainable against the principal, because of the inherent nullity of the alleged obligation sued on, no action can be maintained against sureties on such obligation, for a surety is only bound for the acts of his principal, and if there were no principal, there could not be a surety. Even after judgment against sureties they are entitled to be relieved if their principal is discharged for some cause going to the original transaction and not merely personal to

¹ Earle v. Crum, 42 Miss 165; citing, Stewart v. Morrison, 38 Miss. 417; Ex parte Atkinson, 40 Miss. 17.

him. * * * This results from the accessory character of a surety, whose existence presupposes the existence of a principal for whose acts he is bound.”¹

§ 363. Sureties of guardian — When entitled to subrogation to rights of ward. — It is a well settled principle of equity that whenever several parties are liable for a debt, or fund held in a fiduciary capacity, that party is primarily liable, who originally owed the debt, or received the money, or exercised the trust. Parties who became responsible in a secondary or subsidiary capacity, if compelled to answer the demand are thereupon entitled to be subrogated to all the rights of the original creditor, and may enforce against the primary debtor all the remedies which appertained to the original creditor. Thus the sureties of a guardian may, upon payment of the debt to the ward, be subrogated to all his rights against their principal, and if he is insolvent the payment of the debt to the ward, is not a necessary prerequisite to their taking steps against the guardian in order to save themselves from loss. In all such cases, however, they stand in point of legal remedies precisely upon the same footing with the original creditor; and are entitled to no priorities, equities, or remedies to which he was not entitled. The essential principle of subrogation is that the substitute creditor takes the place of the original creditor, and is entitled to no higher right or better remedy than he is, for the stream can rise no higher than the fountain.²

§ 364. Rights of sureties of guardian — When subordinate to homestead right. — Neither an original creditor, nor the surety who is subrogated to his rights, can enforce

¹ Crum *v.* Wilson, 61 Miss. 233, 236; citing, Brown *v.* Bradford, 30 Ga. 927; Hempstead *v.* Coste, 36 Mo. 437; Ames *v.* Maclay, 14 Iowa, 281; Dickson *v.* Bell, 13 La. Ann. 249; Miller *v.* Gasklins, 1 Smedes & M. Ch. 524; Beall *v.* Cochran, 18 Ga. 38; Boyd *v.* Swing, 38 Miss. 182.

² Adams *v.* Gleaves, 10 Lea (Tenn.), 367.

any claim to property held under a homestead or exemption law, unless the liability was contracted before the homestead or exemption right had vested. And where a guardian had executed his bond before the enactment of a homestead law, which vested in him the right of homestead, but renewed his bond after the passage of the act, the renewal of the bond was regarded as a new contract, and the sureties upon it could set up no claim to the property covered by the homestead, unless they could show that the default for which they were held liable, had been made before the enactment of the homestead law.¹

§ 365. When a cause of action accrues upon the bond of a guardian — Statute of limitations. — The question, when a cause of action on a guardian's bond accrues, sometimes becomes a critical one, in view of the operation of the statute of limitations. The guardian's bond, as already shown is a continuing bond, and the obligors cannot be held liable until after the termination of the trust by competent judicial authority. When, therefore, the guardian has been duly cited to appear and account with the tribunal to which, under the laws of the state, he is responsible for his trust, and an account has been taken, and the amount for which he is liable to his ward judicially ascertained, and he fails to pay that amount, then, and not till then, an action may be brought on his bond. He is not in default until he has been denuded of his trust and required by the court to pay over the trust fund to his ward, or to his successor, or into court, and has failed to do so. Then there is a cause of action, and then the statute of limitations begins to run in favor of his sureties. Such is the ruling of an Arkansas case, in which it is said that it is only the final settlement of the guardian which furnishes the cause of action on his bond.²

¹ *Christian v. Clark*, 10 Lea (Tenn.), 630.

² *Moore v. Nichols*, 39 Ark. 145; *Connally v. Weatherby*, 33 Ark. 658.

§ 366. What is a sufficient averment of a breach of guardian's bond — Evidence on uncontested point. — As already stated, the fact that a guardian has been denuded of his trust, will create a cause of action on his bond unless he responds to the requirements of the court by payment of the amounts for which he has been found to be liable. If, therefore he has not paid the amount, any one of the beneficiaries of his trust may cause an action to be instituted against him and his sureties. And it is not necessary that the real plaintiff in such an action shall aver and prove his interest in the subject-matter of the suit, unless it is specially denied. The general denial prescribed by the practice acts of Indiana, does not put in issue the identity of the defendant's ward with the real plaintiff in an action on his bond, nor is it necessary that there should be evidence that the relator had arrived at the age of twenty-one years. It is not his majority, but the guardian's removal from his trust that creates the right of action upon his bond, and the capacity to sue will always be presumed, unless specially disputed.¹

§ 367. Guardian's general bond — Special bond for proceeds of real estate sold — Effect of new bond — What it covers. — A surety may upon application to the proper court, be released from his obligation upon a guardian's bond. In such case his release will only take effect when adequate security has been given by the execution and delivery of a new bond, which operates as a security for all the liabilities of the guardian at the time of its execution. Where a guardian had given a general bond, and afterwards a special bond to secure the proceeds of real estate sold by order of the court; and one of his sureties, who was an obligor on each of the bonds, was relieved of his liability upon the guardian giving a new general bond; the court held, that the new general bond covered the whole liability previously protected by both the antecedent

¹ Moody v. State, 84 Ind. 432, 436.

bonds, and "the liability of the guardian for all the money or property then in his possession under the trust."¹

§ 368. Duty of guardian when ward arrives at the age of twenty-one years — Liability of sureties — Laches.—It is the duty of a guardian when his ward arrives at the age of twenty-one years to make his final settlement with the court under the jurisdiction of which he has been acting, close his accounts, and hold himself in readiness to pay over to his ward whatever money or property he may be entitled to receive. Then his continuing trust will terminate. If he fails to do this, or if, having made his settlement, he fails to pay as his duty requires, an action will lie upon his bond "at the relation," or "for the use" of his ward. If the ward neglects his interest and does not promptly cause the suit to be instituted, his delay in no respect enures to the benefit of the guardian or his sureties. He owes no duty to either, and although the guardian may become insolvent before he shall be called upon to account and pay over to the ward the amount of his estate, the loss will fall upon the sureties, who, in this connection are expected to take care of themselves, and the ward is under no obligation to bestir himself at any earlier day than the period prescribed by the statute of limitations. "The mere neglect of a creditor to bring suit on his claim for a period less than the time prescribed by the statute of limitations, does not discharge the sureties, although in the meantime the principal debtor becomes insolvent."²

§ 369. Bonds of guardian in one state executed with reference to the laws of another state.—It happens, sometimes, that guardians find it necessary to execute bonds in accordance with the laws of a state different from the state of their domicile, or that of their wards. Where

¹ Moody *v.* State, 84 Ind. 433, 438.

² Newton *v.* Hammond, 38 Ohio St. 430, 437.

there is property of an infant situated in a state foreign to the domicile of the infant, it is the right and duty of the authorities of such state to forbid the removal of such property, unless due and satisfactory provision is made for the security of the property, and the protection of the infant. It may do this by requiring either that the guardian shall give bond in the state where the property is situated, or furnish satisfactory legal evidence that he has given, in the state of his ward's domicile, a bond which will protect the infant and secure to him the fund sought to be removed. Such a bond, executed in the state of the infant's domicile, and conforming to the laws of the state, whence it is proposed to remove the fund, will be enforced in the state of the infant's domicile, although it may contain provisions and conditions which are not required in guardian's bonds in the state of the domicile. Thus, property of an infant resident of Missouri was in the hands of a clerk and master of a chancery court in Tennessee, and the Missouri guardian gave a bond in that state, varying in some respects from the bond required of guardians in Missouri, but conforming to the requisitions of the Tennessee law. Upon this bond he obtained the property which was in the hands of the Tennessee officer. The bond having been put in suit in Missouri was held to be valid, although it was broader than the bond required in Missouri, and although the guardian had executed it in addition to his regular statutory bond. It was further held that the plaintiff could resort either to the irregular or the regular bond at his option, and although there could be but one satisfaction, the ward might pursue all his remedies until fully paid.¹

¹ *State ex rel. v. Williams*, 77 Mo. 463, 470; citing, *United States v. Bradley*, 10 Pet. (35 U. S.) 343; *Ring v. Gibbs*, 26 Wend. 510; *Triplet v. Gray*, 7 Yerg. 17; *Nunn v. Goodlett*, (5 Eng.) 10 Ark. 89; *Pratt v. Wright*, 13 Gratt. 175; *Flint v. Young*, 70 Mo. 221, 225, 226; *Haskill v. Farrar*, 56 Mo. 497; *State ex rel. v. Colman*, 73 Mo. 684; *State ex rel. v. Steele*, 21 Ind. 207; *Wood v. Williams*, 61 Mo. 63; *State v. 1 Drury*, 36 Mo. 28.

CHAPTER XI.

BONDS REQUIRED IN JUDICIAL PROCEEDINGS.

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SECTION 399. Judgment upon an injunction bond may be enjoined.

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401. Similarity of bonds required in judicial proceedings — Reference to subsequent chapters.

§ 375. Bonds authorized or required in judicial proceedings — In general. — Bonds required or authorized in judicial proceedings are of several varieties and all are fairly to be regarded as official bonds under the classification adopted in this work, because they can only become operative by virtue of positive law, and generally constitute a portion of a judicial record. They are usually furnished as an inducement to some order or proceeding desired by their principal obligor in a suit or action at law in which he is a party. Thus a defendant by a bail bond may effect his release from an arrest of his person, and a plaintiff by an attachment bond with the statutory affidavit may procure the issuance of the swift and stringent process which he thinks his interest demands. An injunction bond is essential to the issuance of an injunction by which irreparable injury to the complainant may be prevented; and final process may be superseded, and an appeal and rehearing secured by a timely application supported by a sufficient appeal bond. The possession of property of which the title is in litigation may be secured by a replevin bond, and an adequate indemnity bond will secure the prompt and zealous action of even a cautious and timid sheriff or constable.

Bonds of this class differ from ordinary official bonds in that they are more definite in their terms, conditions, and operation. They are intended for the benefit of a particular named person, and not for the indefinite community, or any person who may suffer loss by their breach. They are rarely of a continuing character, are made for a special occasion and pass away with the litigation which brought them into existence. This chapter is devoted to the consideration of this class of official bonds.

§ 376. Attachment bonds — What they are — Where required and for what purpose. — The issuance of ordinary legal process it is well known is a matter of common right. Any one may bring an action at law and all that is ever required of him is security for costs or an affidavit *in forma pauperis*. But to obtain the process of attachment in all except a few states, much more is required; it must be shown by affidavit that the demand is just, that the defendant is a non-resident of the state, or that he has fraudulently removed or is removing his property beyond the jurisdiction of the court, or that he so absconds or conceals himself that the ordinary process of the law cannot be served upon him, and in some states there are other allegations which if duly verified will authorize the issuance of the process. Still further, however, in most of the states in which the process is in use, the plaintiff is required, before the attachment will be issued, to furnish a bond with good security conditioned that he will prosecute his suit with effect or pay all damages which the defendant may suffer from the wrongful suing out of the attachment. If property is taken under the process, the plaintiff secures his debt to the extent of the value of the property, provided, of course, he can establish the justice of his demand. If he does so, or in the language of his bond, "prosecutes his suit with effect," the bond he has given is void and for him "all's well that ends well." If he fails in his suit he must be prepared to shift positions with the defendant and await his onset with his attachment bond.

To sustain an action on an attachment bond it is not at all essential to show that the process was sued out maliciously. It is sufficient that its issuance was *wrongful*, that it was unwarranted by the law under the actual circumstances of the case.¹ In Alabama it was decided that if

¹ *Wilson v. Outlaw, Minor* (Ala.), 367; *Tallant v. Burlington, etc., Co.*, 37 Iowa, 261; *Seay v. Greenwood*, 21 Ala. 491; *Dunning v. Humphrey*, 24 Wend. 31; *Williams v. Hunter*, 3 Hawks. (N. C.) 545; *s. c.*, 14 Am. Dec. 507.

the attachment had been issued upon *just* grounds and afterwards abated for informality, actual damages could not be recovered in a suit upon the attachment bond, and the court doubted whether a judgment could be rendered for nominal damages.¹ The court says that what is meant by the “wrongful suing out” of the process is not error or irregularity in the proceeding, but that there existed no adequate reason for instituting the suit. And in some states it had been decided that an abandonment of the action or a failure to “prosecute it with effect,” to use the language in which the condition is generally couched, is not of itself sufficient cause of action on the bond, but the process must have been *wrongfully* procured, without any just cause.²

§ 377. Same subject continued. — These cases, it may be remarked, were under special statutes authorizing attachments to issue from courts of equity, and it may well be doubted whether in the teeth of the express words of the bond such a ruling could be sustained in an attachment issued by a court of law. And in Louisiana it is held that “if a plaintiff in an attachment voluntarily abandons it, he renders himself and his surety responsible in damages, and if it be set aside by order of the court, it is *prima facie* evidence that it was wrongfully issued; and that damage to some extent has been sustained.”³ The two cases cited were cases of injunction bonds, but manifestly the same principle controls both classes of cases. Usually the levy of an attachment or the service of an injunction does at the outset the greater part if not all the mischief to the defendant that the suit could have worked had it been prosecuted to the bitter end. It deranges the defendant’s business,

¹ *Sharpe v. Hunter*, 16 Ala. 765 citing, *Kerksey v. Jones*, 7 Ala. 622.

² *Smith v. Story*, 4 Humph. 169; *Pettitt v. Mercer*, 8 B. Mon. 51.

³ *Cox v. Robinson*, 2 Rob. (La.) 318, 318; citing, *Penniman v. Richardson*, 3 La. 103; *Florence v. Nixon*, 8 La. 291.

upsets his calculations, thwarts his plans, and impairs his credit, and if after having done all the mischief to the defendant that could be effected by the initial proceedings of the litigation, the plaintiff withdraws his forces, and thereby admits that he had acted without adequate cause he should assuredly be responsible for damages, exemplary, actual, or nominal according to the facts of the case. And in Indiana even success will not sanctify wrong and oppression in the use of this process and “if the attachment proceedings are wrongful and oppressive, that gives the defendant a right of action, whether the plaintiff had a good cause for his main action or not, or whatever may be the result of the principal action.”¹ If it be said that although a plaintiff has a sufficient cause of action against the defendant, it does not by any means follow that he has a right to an attachment. His right to the process must be set forth in an affidavit following the statute, and the facts alleged in that affidavit may, in a proper case, be traversed by a plea in abatement. . .

§ 378. Attachment bond enures only to the benefit of the defendant in the suit.—An attachment bond, as already intimated, is required by the law in the interest of the defendant, and of him only. The manifest object of it is to secure him from the consequences of harsh and summary interference with his property by an officer of the law at the instance of a person who may not be his creditor at all, or if a creditor, one who is not entitled under the terms of the law to the remedy which he invokes. Consequently an attachment bond is not an indemnity bond, and no action will lie upon it for the benefit of a stranger whose property was taken under it. “The damages are recoverable against the plaintiff only ‘for his suing out the attachment,’ and, of course not for a trespass committed by the officer for levying it contrary to the mandate of the writ.” The

¹ *Harper v. Keys*, 43 Ind. 220.

"stranger" must, if his property is taken by an officer under an attachment, resort to the officer's official bond and his sureties upon that bond, and to the indemnitors, if the officer has been prudent enough to take an indemnity bond, and cannot hold the sureties on the attachment bond responsible. They guaranteed that the process was lawfully sued out, they did not guarantee that it should be lawfully executed. They were the sureties of the plaintiff, not of the officer into whose hands the process might come. If, however, an attachment is issued against specific property as the property of the defendant, the true owner of that property can maintain an action on the bond because the sureties bound themselves for the act of the officer in seizing that identical property.¹

§ 379. Action on attachment bonds — Where there are several obligees — When action may be brought. — When an attachment bond has been made payable to several defendants they may maintain a joint action on the bond, although the damages sustained by them were several, the attachment having been levied on the separate property of each of them.² And in Ohio the very sensible rule is adopted that the obligees who have been injured may sue upon the bond, or undertaking, as it is called in that state, irrespective of other obligees who have not been injured.³

It is essential, of course, in a suit upon an attachment bond, as in all other cases, that there shall be an actual perfected cause of action in existence when the suit is brought, and this can only be after the original attachment suit has been determined and the attachment finally discharged. Until that is done there could be no certainty in

¹ *Davis v. Commonwealth*, 13 Gratt. 189. See, also, *Raspellier v. Brownson*, 7 La. 281.

² *Boyd v. Martin*, 10 Ala. 700; citing, *Gayle v. Martin*, 3 Ala. 593; *Hill v. Wood*, 4 Ala. 214.

³ *Alexander v. Jacoby*, 23 Ohio St. 358.

a judicial sense, whether the attachment was properly issued or not.¹ In Kansas, however, when before the termination of the action in which the attachment was issued, and in an interlocutory proceeding, the attachment was dissolved by the court, on the ground that it had been wrongfully issued, because the reasons stated in the affidavit were untrue, a right of action on the attachment bond at once accrued to the defendant in the original suit.²

§ 380. Same subject continued.—In Mississippi an action cannot be brought upon an attachment bond until after an action against the principal personally, for wrongfully suing out the process has been ineffectually prosecuted. The ruling is founded on the fact that the condition of the bond prescribed by the statute is in the alternative, “shall prosecute his said suit with effect or * * * shall well and truly pay and satisfy the said — all such costs and damages as shall be awarded against him * * * in any suit which may hereafter be brought against him for wrongfully suing out the said attachment.” Manifestly under the terms of this bond the breach was not complete until the principal in the bond had failed to “pay and satisfy” as required by the bond, and of such failure a judgment for the costs and damages, an execution and a return of *nulla bona* was the best evidence.³ And in Georgia under a similar statute there is a like ruling.⁴ In Montana it was held upon demurrer that in an action upon an attachment bond it was necessary to allege that damages had been awarded to the original defendant against the original plaintiff for having wrongfully sued out the attachment.⁵ In California there

¹ *Nolle v. Thompson*, 3 Metof (Ky.) 121; *Bettick v. Wilkins*, 7 Heisk. 307.

² *Kerr v. Reece*, 27 Kan. 489.

³ *Holcomb v. Foxworth*, 84 Miss. 265.

⁴ *Sledge v. Lee*, 19 Ga. 411.

⁵ *Penney v. Hishfield*, 1 Montana, 367, 370.

is a like decision that no sufficient breach is averred, unless it be alleged that damages were awarded.¹ All these cases depend upon the language of the statutes of the states respectively, and of the condition of the bonds prescribed by them.

§ 381. Same subject continued. — On the other hand, in other states the opposite construction is placed upon the language of their statutes and of bonds framed in pursuance of them. Such is the ruling in Illinois in which the supreme court says: “Our statute intends to afford a remedy to the defendant in attachment, if the attachment is not sustained, although it may have been sued out in good faith and upon probable cause. If the party could only sue upon the bond after he had recovered a judgment for a malicious attachment, he might sustain a most serious loss by the wrongful act of the plaintiff, even where it was not malicious.”²

The rule in Alabama is the same as in Illinois, that no previous judgment is necessary to justify an action on an attachment bond.³ In Virginia, too, an antecedent assessment of damages is not necessary to authorize an action on an attachment bond for the wrongful suing out of the process.⁴

Of course, however, everything depends upon the language of the bond and of the statute by which it is authorized. It is simply a question of construction of the language used, in the bond or in the statute. Upon principle it may be added that unless the construction is manifestly repugnant to the terms of the statute or of a bond, the right of action should be held to accrue when the damages have been sustained, and the plaintiff should not be compelled to

¹ *Tarpey v. Shellenberger*, 10 Cal. 390.

² *Churchill v. Abraham*, 22 Ill. 455.

³ *Herndon v. Forney*, 4 Ala. 243.

⁴ *Dickinson v. McCraw*, 4 Rand. 158.

maintain a fruitless action against the principal alone, before suing upon the bond the principal and his sureties.

§ 382. Damages that may be recovered in an action on an attachment bond. — The general rule is that in actions on an attachment bond the measure of damages is the actual loss or injury suffered by the attachment defendant, including all costs and expenses.¹ Remote damages and those of a speculative or uncertain character cannot be recovered, such as damages for injury to character, credit, or business, unless, indeed, the suing out of the process was malicious and in bad faith.² Malice and bad faith on the part of the principal obligor in the bond, co-existing with a want of probable cause, will tend to the aggravation of damages, and to this extent and under these circumstances exemplary damages will be awarded in actions of this character.³

The subject of damages, however, is too broad to be fully discussed in these pages, and the reader must be referred to works devoted specially and exclusively to that branch of the law. It must suffice here to say that the general rules controlling actions founded on official bonds are: that usually the plaintiff can recover only the actual damage which he has sustained with costs and expenses; that he cannot recover remote and speculative damages founded upon alleged injury to his character, credit, or business; and that exemplary damages will not be awarded unless there is a concurrence of want of probable cause, bad faith, and malice on the part of the creditor who sues out the process.

¹ *Donnell v. Jones*, 13 Ala. 490; *Dunning v. Humphrey*, 24 Wend. 231; *Johnson v. Bank*, 4 Bush, 283; *Munnerlyn v. Alexander*, 38 Tex. 125; *Wilson v. Root*, 43 Ind. 486; *Hayden v. Sample*, 10 Mo. 215. See, also, *Moore v. Stanley*, 51 Mo. 317; *Hughes v. Brooks*, 36 Tex. 379; *Boatright v. Stewart*, 37 Ark. 4.

² *Pettitt v. Mercer*, 8 B. Mon. 51; *Campbell v. Chamberlain*, 10 Iowa, 337; *State v. Thomas*, 19 Mo. 613; *Myers v. Farrell*, 47 Miss. 281; *Floyd v. Hamilton*, 33 Ala. 235; *Plumb v. Woodwanses*, 34 Iowa, 116.

³ *Renkert v. Elliott*, 11 Lea (Tenn.), 235. See, also, *Pollock v. Ganatt*, 69 Ala. 373.

§ 383. When set-off is permissible in actions upon official attachment bonds and undertakings. — An action on an attachment or other official bond, although in form for the penalty, is in reality for unliquidated damages, and the question was raised in Nebraska, whether the defendant, the principal obligor in such a bond or undertaking, was entitled to plead a set-off to the liability incurred by him in the execution of the bond. The court held that the set-off was admissible although the damages were unliquidated. How far, generally, unliquidated damages may be the subject of set-off, is a question which will not be here considered; in the ruling cited above it will be observed that the debt offered as a set-off was certain, the original demand being unliquidated; if the original demand had been for a fixed sum, and the set-off unliquidated damages, it is believed that upon principle and by the general current of authorities the right to a set-off could not be sustained.¹

§ 384. Delivery and forthcoming bond — Officer's Return prima facie evidence of forfeiture, if the bond is statutory. — It is a usual practice in most of the states for the sheriff or other officer of the law, upon making a levy upon personal property, to leave the property where he found it upon receiving from the execution defendant, or other persons, an undertaking in writing on the part of its obligors to deliver the property to the officer on the day of sale, or other specified day, or upon demand. The practice as to the day of delivery, varies in the different states. These undertakings, called in some of the states delivery bonds, in others, forthcoming bonds, in still others simply receipts, are, when bonds at all, official and statutory, and when forfeited may usually be enforced by summary proceedings. In West Virginia the return of the sheriff on a

¹ Raymond *v.* Green, 12 Neb. 215; citing, Stevens *v.* Able, 15 Kans. 584; Read *v.* Jeffries, 16 Kans. 584; Wagner *v.* Stocking, 22 Ohio St. 247.

forthcoming bond that its condition has not been performed, is *prima facie*, but not conclusive evidence of its forfeiture. This is the rule if the bond follows the statute in its terms. If, however, it varies from the provisions of the statute in any material respect, it is not official or statutory, and the return of the sheriff is not even *prima facie* evidence of a forfeiture. In such a case the bond is at its very best valid as a common-law bond, and must be enforced by the ordinary common-law process. Such a bond was one in which the day fixed for the delivery of the property was different from the day fixed for the sale. In this respect it failed to follow the statute, which prescribed that the property should be delivered on the day of sale. This variation, deprived its beneficiary of the privilege of having a judgment by motion upon it as a statutory bond, but did not invalidate it as a common-law bond.¹

§ 385. Indemnity Bonds—When valid and when void.—It is a very proper as well as usual practice for an officer when required in the course of his business to seize property, the ownership of which is in dispute, to demand indemnity from the party on whose behalf the seizure is to be made. And in such case if the action of the officer in executing his process shall prove to be a trespass, he will be entitled to reimbursement for all damages he may suffer, provided he acts in good faith and the process under which he has proceeded be regular upon its face. And the remedy on the bond is equally available, whether that instrument be strictly in conformity with the statute or only good as a voluntary or common law bond provided the act to be done is not in contravention of a statute or against the peace, or the policy of the law.

¹ *Adler v. Green*, 18 W. Va. 201; citing, *McKenster v. Garratt*, 3 Rand. 554; *Bernard v. Scott*, 3 Rand. 522; *Pleasants v. Lewis*, 1 Wash. (Va.) 273; *Nicholas v. Fletcher*, 1 Wash. (Va.) 330; *Bark v. Levy*, 1 Rand. 1; *Jones v. Raines*, 4 Rand. 386; *Cole v. Fenwick*, 1 Gilm. 134; *Erwin v. Eldridge*, 1 Wash. (Va.) 161; *Porter v. Daniel*, 11 W. Va. 253.

There is, however, another consideration by which the rights of the officer to indemnity and the validity of the indemnity bond are very seriously affected. The rule is that an officer is not entitled to indemnity for a contemplated seizure under color of process if he *knows* that such seizure will be a trespass, but if at the time it is not known that it will be a trespass the promise to indemnify is a valid promise.¹ If, therefore, the bond purports to indemnify the officer for an act which under no circumstances he had a legal right to perform, and which is therefore necessarily a trespass and can be nothing else, the bond is void as against the policy of the law, and the officer is of course, a trespasser and without any remedy upon the illegal indemnity bond. Thus, in Colorado, as well as elsewhere, a sheriff has no right to execute process not directed to him, but directed to "any constable of said county," and if he presumes to execute such process, he is a trespasser *ab initio* and being presumed, like other people, to know the law, is in the position of one who founds his course of action on an illegal act known to be such when committed. Under such circumstances his bond of indemnity being against the peace and policy of the law is illegal and void.²

§ 386 Indemnity bond — What will not operate as a release of such a bond. — When a bond is given by a plaintiff to indemnify an officer for seizing property which is claimed by a third person, the breach of the bond is complete, and the liability of its obligors accrues, when a judgment is recovered by the claimant against the officer. The indemnity bond then becomes single and absolute, the liability of the officer, which it was the purpose of the bond to protect him against, was perfected, and with it, his

¹ *Porter v. Stapp*, 6 Colorado, 32; *Stone v. Hooker*, 9 Cowen, 155.

² *Porter v. Stapp*, 6 Col. 32; *Hardesty v. Price*, 3 Col. 558; *Purple v. Purple*, 5 Pick. 226; *Cumpston v. Lambert*, 18 Ohio, 81; *Adams v. Jarvis*, 4 Bing. 66; *Nelson v. Cook*, 17 Ill. 443.

right to bring suit upon the bond. If then as the price of a release from personal liability on the judgment he should assign the indemnity bond to the claimant, such release is in no respect a release of the indemnitors, but an action can be maintained against them on the bond so assigned.¹

§ 387. When actions on official bonds constitute continuation of suit. — When by statute a bond is directed to be given in certain contingencies occurring in the course of an action at law or other legal proceeding, as for example, in an action of detinue or replevin, any action which may be brought upon the bond is a continuation of the original suit and must be instituted in the same court in which the original suit was brought.²

§ 388. Appeal bond — Damages recoverable on irregular bond. — Among other bonds which are in general use in judicial proceedings are appeal bonds, and the conditions of these bonds are controlled by the character of the judgment from which the appeal is taken. If the appeal be taken by the defendant against whom a money judgment is rendered, the appeal operating as a *supersedeas*, the condition of the bond should of course secure the debt, damages, and costs. If, however, the bond be irregular and fails to contain all the conditions which the law requires, it will be good as far as it goes, if the cause proceeds upon the faith of the bond, and judgment may be rendered against the principal and sureties to the full extent of the liability incurred by the bond, and against the principal only for the residue. Thus, where upon the rendition of a judgment for a debt, damages, and costs, an appeal was taken and bond given “for all costs and damages that may be adjudged against him (the defendant) by the court having cognizance

¹ *McBeth v. McIntyre*, 57 Cal. 49; *Jones v. Childs*, 8 Nev. 121; *Chase v. Hinman*, 8 Wend. 452.

² *McDermott v. Doyle*, 11 Mo. 443.

thereof," the judgment upon the appeal bond can only be for the damages and costs. And in such a case the damages are simply the interest on the debt, at the ordinary legal rate, unless by statute, as in some of the states, a higher rate of interest is prescribed. And if the bond be given by an executor or administrator, and includes the debt as well as damages and costs, judgment cannot be rendered on it for more than the damages and costs, because the executor or administrator is not (ordinarily) liable *de bonis propriis* and a judgment against his surety would bind him for a liability with which his principal could not be charged. "The word 'damages' in an appeal bond, means the damages in consequence of the appeal, that is the interest at the rate fixed by statute upon the amount of the judgment below, from the date of its rendition to the time of entering the judgment above. And the damages are recoverable against the surety whenever the appeal is not prosecuted with effect, that is to say, where the final recovery is for the same, or a larger amount than the judgment below." And in Tennessee it has been held that if the bond be conditioned for the payment of "costs and damages," and the judgment (the action being covenant) was for damages, the surety on the appeal bond is not bound for the damages assessed by the jury and awarded by the trial court in the judgment, but only for the prescribed interest on that amount and the costs of the cause.¹ And in the same state it is settled that the appeal bond for "costs and damages" in a chancery case does not impose upon the surety any liability for the costs in the court below, but only for

¹ *Mason v. Smith*, 11 Lea (Tenn.), 69, 72; *Gholson v. Brown*, 4 Yerg. 496; *Jones v. Parsons*, 2 Yerg. 321; *Matlock v. Bank*, 7 Yerg. 95; *Bank v. Williams*, 3 Coldw. 579; *Nunnellee v. Morton, Cooke (Tenn.)*, 21; *Dodson v. Dodson*, 6 Heisk. 110; *Sharp v. Pickens*, 4 Coldw. 268; *Hutchinson v. Fulghum*, 4 Heisk. 550; *Banks v. McDowell*, 1 Coldw. 85; *Mason v. Anderson*, 12 Heisk. 38; *Mason v. Metcalf*, 4 Baxt. 440; *Nichol v. McCombs*, 2 Yerg. 83; *Banks v. Brown*, 4 Yerg. 193.

the costs incident to the appeal, including the costs in the appellate court.¹

§ 389. Injunction bonds — Objects and characteristics of them. — One of the most usual of official bonds required in equity practice is the injunction bond, which is an indispensable condition precedent to the issuance of that most “potent instrument,” the writ of injunction. The subject of injunction bonds is regulated by statute in the several states, the differences between the provisions of the statutes are not very material, the object being the same in all, to protect the defendant from illegal interference with his rights and property, and to reimburse him for all damages and costs which he may have suffered by reason of the wrongful or illegal issuance of the injunction against him.

Whenever a bond is required by statute as a condition precedent to the issuance of an injunction, the statute is in that respect mandatory and the issuance of the injunction without a due compliance with the law is error.² As in most other contracts injunction bonds are to be construed according to the law in force at the date of their execution and are not affected by statutes passed subsequently.³ But if the matter is not definitely settled by statute law and the terms and conditions prescribed by positive law, it rests within the judicial discretion of the chancellor, or other judge issuing the *flat*, to fix the terms upon which the process will be issued and any bond executed under these circumstances and couched in the terms prescribed by the chancellor or judge will be duly enforced if the principal fails to prosecute his suit or in other respects to fulfill the conditions of his bond, he and his sureties are liable upon it.⁴

An order for an injunction is wholly ineffectual until the

¹ Denton *v.* Woods, 11 Lea (Tenn.), 505; Dawson *v.* Holt, 12 Lea (Tenn.), 27.

² Miller *v.* Parker, 73 N. C. 58.

³ Mix *v.* Vail, 86 Ill. 40.

⁴ Newell *v.* Partee, 10 Humph. 825.

bond is executed with the prescribed and sufficient security.¹ A bond of this description takes effect and becomes obligatory as soon as it is filed in the proper office, and this has been held in Michigan is equivalent to delivery, or is in fact such delivery as is appropriate to its character, it being in some respects necessary that the court should retain jurisdiction of it.² And all the parties to the suit who are affected by the injunction are entitled to the benefit of the bond.³

§ 390. Insufficiency of injunction bond. — The insufficiency of an injunction bond will be an adequate reason for dissolving the injunction, but the process remains in force and the bond obligatory until the injunction shall have been dissolved. And the mere insufficiency of the bond, although ultimately a good reason for dissolving the injunction, is not so in the first instance. A reasonable time should be allowed to the plaintiff to enable him to file a better bond.⁴ It is always competent for the court, if the litigation should be protracted, or for any other good reason, to require the filing of an additional bond or further security. In order, however, to make out a case which will justify the court in requiring such additional security, it is important that it should be made to appear that the plaintiff is insolvent and himself unable to respond to the requisitions of the bond. This, however, is a matter within the judicial discretion of the court.⁵ And where the process is in other respects duly issued, and upon sufficient grounds, the injunction will not be dissolved merely because the bond is not for as large a sum as it should be. To effect that

¹ *Pell v. Lander*, 8 B. Monr. 554.

² *Lathrop v. Southworth*, 5 Mich. 436, 447.

³ *Cumberland, etc., Co. v. Hoffman, etc., Co.*, 39 Barb. 16.

⁴ *Beauchamp v. Kankakee County*, 45 Ill. 274, 276. See, also, *Gamble v. Campbell*, 6 Fla. 347; *Chesapeake, etc., Co. v. Patton*, 5 W. Va. 234.

⁵ *Crawford v. Paine*, 19 Iowa, 172, 175.

result, it must be made to appear that the defendant has been injured or unwarrantably endangered by the insufficiency of the bond.¹

391. When action can be maintained on an injunction bond.—It has been said in a previous section that an action may be maintained on an attachment bond as soon as the attachment has been dissolved, but the rule is otherwise in relation to injunction bonds. An action on a bond of that character cannot be instituted before the termination of the suit in which the injunction issued, for the manifest reason that in the further proceedings, upon sufficient cause being shown, the injunction which had been dissolved may be reinstated and perpetuated.² It cannot be judicially known that the injunction was wrongfully sued out until the suit is disposed of.³

§ 392. Injunction bond—Statute of limitations.—An action will not lie upon an injunction bond before the injunction has been dissolved nor, usually, after that time, before the suit has been decided. Hence, as the statute of limitations will not begin to run in favor of a surety on such a bond until the right of action has accrued, the limitation will not be perfected, nor the bar formed, until the prescribed period has elapsed after the dissolution of the injunction or the final decree in the case in which it was issued.⁴

§ 393. Injunction bond from sister state—Constitutional law—Retrospective law.—Judicial bonds are so far

¹ *Drake v. Phillips*, 40 Ill. 388.

² *Goodbar v. Dunn*, 61 Miss. 624; *Penny v. Holberg*, 53 Miss. 567; *Gray v. Viers*, 33 Md. 159; *Hanserd v. Gray*, 46 Miss. 75; *Bemis v. Gannett*, 8 Neb. 236; *High on Injunctions*, § 1649.

³ *Thompson v. McNair*, 64 N. C. 448. See, also, *Shackleford v. Smith*, 61 Miss. 5.

⁴ *Pickett v. Boyd*, 11 Lea (Tenn.), 498.

ambulatory that those executed in one state will, in a proper case, be enforced in another. Thus an injunction bond executed in Arkansas, in an equity proceeding in that state, formed the cause of action in a suit brought against a surety obligor resident in Tennessee. The damages had been assessed in the Arkansas tribunal, and a bill in equity was filed in Tennessee to recover them. The code of Arkansas, § 3485, provides that "judgment shall be rendered against the party who obtained the injunction, and the assessment shall be conclusive upon the surety of such party ;" this provision was not in force at the date of the execution of the injunction bond, but it was held that as it only affected the remedy upon the bond and did not interfere with the right, it was not retrospective in the sense of the constitutional prohibition.

The reasoning and authority by which the court reaches its conclusions are quite questionable. It is certainly true that retrospective legislation which merely affects the remedies of parties is not within the constitutional inhibition of impairing the obligation of contracts; but it may admit of grave doubt whether the Arkansas statute is of that character. When the bond was signed the law then in force entered into and formed part of the contract of the surety, that law guaranteed to him that any judgment that might be rendered against his principal should, at most be only *prima facie* evidence against him. The intermediate statute made such a judgment, if it should be rendered, *conclusive* against him. A judgment against the principal, under the circumstances indicated, implies that it is not also rendered against the surety, and that he is not before the court, for if he were, the judgment would be against him also; if, therefore, a judgment so rendered against the principal in the absence of the surety be *conclusive* against the latter, it is in effect a judgment against him, rendered in his absence, without any opportunity of defense or any day in court. This sort of legislation, it is believed, goes somewhat beyond

the regulation of remedies, and infringes one of the most important and valuable of rights, the right of being heard in courts of justice in defense of property interests. Under these circumstances a surety might well stand upon the letter of his contract, which included the existing law, and say, *non haec in foedera veni.*¹

§ 394. Injunction bonds, irregular and defective — When enforced. — Injunction bonds, in common with most other obligations, must be so construed *ut res magis valeat quam pereat*. If a bond of this description is defective because it does not contain all that the statute requires, it will nevertheless be enforced as to the material conditions prescribed by the statute which it does contain.² And on the other hand, if besides embodying all the statutory requirements for a perfect and complete injunction bond, it includes other conditions and obligations which are not authorized by the statute, but which nevertheless are not against the law or in violation of public policy, the bond will not be vitiated thereby, but will be held valid, the extraneous matter being regarded as surplusage.³

§ 395. When an injunction bond will be strictly enforced. — If, by the terms of an injunction bond the obligors bind themselves to pay the debt, the collection of which is suspended by the injunction, unless the suit of the obligor shall be successfully prosecuted, the bond will be strictly enforced if the injunction shall be dissolved. And

¹ *Pickett v. Boyd*, 11 Lea (Tenn), 498; citing *Townsend v. Townsend*, Peck (Tenn.) 1, *Woodfin v. Hooper*, 4 Humph. 13, and referring to Meigs' Dig., sect. 727. These authorities tend to establish the undisputed proposition that laws affecting the remedy only are not in derogation of the constitution. They do not support the allegation made by the court, that the Arkansas statute making a judgment against one person conclusive against another who was not before the court, operated only upon the remedy.

² *Holliday v. Myers*, 11 W. Va. 276.

³ *Johnson v. Vaughn*, 9 B. Monr. 217.

this will be done, although the principal obligor was so far justified in resorting to a court of equity that no damages were decreed against him upon the dissolution of the injunction, and he recovered his costs in the chancery suit.¹ In such a case the judgment will be for the whole debt, as the payment of that debt was what the obligation of the bond secured. But if the injunction operates only to prevent the sale of a particular piece of property, and the injunction be dissolved, the measure of damages in an action on the injunction bond will be the loss and injury actually suffered. If the property be lost or destroyed while the injunction was in force, its value could of course be recovered. If there was nothing suffered more serious than delay, the money loss consequent upon the delay and the costs of the suit will be all that can be recovered.²

§ 396. Injunction bond of an executor — What constitutes a breach of such a bond. — In a proper case it may become the duty of an executor to apply for an injunction. In some of the states, as in Virginia and Indiana, it may be granted without requiring of the applicant any further security than that which is furnished by his ordinary bond as executor. In others, as in Kentucky, he is required in common with other persons, to give the prescribed injunction bond with sufficient sureties. When that has been done, if the injunction shall have been dissolved, and an action brought upon the bond, the plaintiff in such a suit is bound to aver not only that there has been a breach of the condition of the bond; but that there were assets when the injunction was obtained, and that there has been a waste of them by the executor, otherwise no judgment can be rendered upon the bond against the executor and his sureties, for they are bound only to the extent of the assets which

¹ *Hunt v. Scobie*, 6 B. Mon. 469.

² *Hanley v. Wallace*, 3 B. Mon. 184.

could legally be applied to the payment of the judgment enjoined. Manifestly, a person holding property in a fiduciary capacity, cannot be made responsible for it unless he has converted it, or been guilty of other maladministration of his trust, and *a fortiori* could not be expected to furnish sureties who would answer demands that could not be legally exacted from him.¹

§ 397. What will support an action or an injunction bond, and what is not put in issue in such an action. — The delay and uncertainty consequent upon the issuing of an injunction constitute a sufficient consideration for the bond.² And in an action upon such a bond, the propriety or impropriety of the issuance of the injunction cannot be put in issue. That is a question for the court in which the injunction suit was pending. By dissolving the injunction and dismissing the bill, the court virtually decides that the plaintiff had no adequate cause of action, and that the issuance of the injunction was improper. Even if the bill is dismissed for want of prosecution, the fact that the plaintiff failed to prosecute his suit, is a virtual admission by him that he had no adequate cause of action. The dismissal is a final judgment in favor of the defendant; and although it may not preclude the plaintiff from bringing a new suit, there is no doubt that for all purposes connected with the particular action, the rights of the parties are affected by it in the same manner as if there had been an adjudication upon the merits. It follows, therefore, that when an injunction is dissolved, and certainly when the suit in which it was granted has been terminated, the breach of the injunction bond is complete and an action can be maintained upon it.³

¹ *Mahan v. Tydings*, 10 B. Monr. 351.

² *Mahan v. Tydings*, 10 B. Monr. 351.

³ *Dowling v. Polack*, 18 Cal. 625; citing and overruling, *Gelston v. Whitesides*, 3 Cal. 309; citing, also, *Loomis v. Brown*, 16 Barb. 825; *Sherman v. New York, etc.*, Mills, 11 How. Pr. 269.

§ 398. What may be given in evidence in defense of an action on an injunction bond — And what constitutes no defense to such an action. — The *gravamen* in an action on an injunction bond is manifestly the issuance of the injunction and its effect upon the rights and interests of the plaintiff in the action. It is usually required in most of the states that the bond shall be executed and filed before the injunction can be issued, but it may sometimes happen that although the bond has been duly executed and filed, the injunction has *not* been in fact issued, and consequently that the chief grievance of the plaintiff has no foundation in fact. In such a case it was held in Alabama, “ notwithstanding the authorities to the contrary in other states,” that the obligors were not estopped by the recital of their bond from denying that the injunction had been “ obtained ” as well as “ prayed for,” that the bond and *flat* constituted merely a *brutum fulmen*, that the plaintiff had not been in fact enjoined, had suffered no injury, and was entitled to no damages. This ruling, it may be remarked, is supported by the statute law of Alabama,¹ which permits a defendant to impeach by plea, and “ inquire into the consideration of a sealed instrument in the same manner as if it had not been sealed.”² In those states in which the consideration of a sealed instrument cannot be impeached or inquired into in a court of law it may be presumed that the obligors in the bond would be estopped by its recitals, and their only relief if they were entitled to any, was to be found in a court of equity.

And it is no defense to an action on an injunction bond after the injunction has been dissolved and the bill dismissed, that another bill had been filed, and another injunction obtained for the same purpose as the first. The two suits are separate and distinct. When the first bill was

¹ Rev. Code, § 2632.

² Adams v. Olive, 57 Ala. 249.

dismissed a cause of action accrued *instanter* on the injunction bond, which could not be taken away by any act of its obligors.¹

§ 399. Judgment upon an injunction bond may be enjoined. — It is a well established principle that courts of equity will interpose and restrain the exercise of a legal right when it would be inequitable and against conscience to assert it. The most familiar form of this interposition is the use of the writ of injunction by which the enforcement of judgments at law is stayed and prevented. A judgment rendered upon an injunction bond does not, in this respect, differ from any other judgment, and the defendant obligor is as fully entitled to his remedy in equity as any other defendant, and is under no obligation to enjoin the prosecution of the suit at law; but having waited until judgment has been rendered, may enjoin the execution of that judgment.²

§ 400. Injunction bond — When new bond may be required. — When an injunction has been granted, and it appears that the bond upon which it was issued was insufficient in amount, the court may well permit the obligor to give a new bond in which that defect shall be remedied, but it is not a correct practice to perpetuate an injunction upon condition that the plaintiffs shall, within a limited time, give such a bond as shall meet the exigencies of the case.³

§ 401. Similarity of bonds required in judicial proceedings — Reference to subsequent chapters. — It is hardly necessary to pursue this subject further. Official bonds required in judicial proceedings are alike in so many respects that it would be superfluous to note the minute

¹ *Weaver v. Poyer*, 73 Ill. 489.

² *Weaver v. Poyer*, 79 Ill. 417.

³ *Downes v. Monroe*, 42 Tex. 307.

differences between them. They are all required by positive law; their substance if not their form is prescribed by statute; they are executed, either by the express orders and under the actual supervision of a court of record, or else upon the requisition of an officer of the law; their custody is under the control of the courts; their sufficiency is adjudicated in the manner prescribed by statute; if not technically, they are practically a part of the record; their beneficiaries are either parties to the cause in which they are filed, or officers of the courts. How they are enforced will be treated in the Fifteenth, Sixteenth, Seventeenth and Eighteenth chapters of this work, on "Actions on Official Bonds;" "Summary Remedies on Official Bonds;" "Pleadings in Actions on Official Bonds;" and "Evidence in Actions on Official Bonds." To these chapters the reader is referred.

CHAPTER XII.

OFFICIAL BONDS UNDER CHARTERS AND BY-LAWS OF CORPORATIONS, BANKS, RAILROADS, AND OTHER COMPANIES.

SECTION 410. What are corporations.

- 411. Powers of corporations to exact official bonds.
- 412. Relation between a corporation and its officers and agents.
- 413. Selection of officer's of corporations.
- 414. Who should sue on a bond given to a corporation.
- 415. When corporation not bound for laches of its officers.
- 416. Corporations can contract with their own members and accept them as securities on official bonds.
- 417. Illegal proceeding of a corporation will invalidate an official bond designed to effect the illegal purpose.
- 418. Conformity of official bonds of corporation officers to the statute by which they are prescribed.
- 419. Delivery, approval and acceptance of official bonds of corporation officers.
- 420. Rules controlling official bonds to corporations as modified by the organic law of the corporation.
- 421. Same subject continued.

§ 410. **What are corporations.** — The multiplication of corporations of a financial, commercial, and industrial character, is one of the most distinctive characteristics of modern business methods. This fact has not failed to impress itself upon the law, and consequently a very large proportion of recent litigation has grown out of corporate rights, and has evolved numerous principles and distinctions, developing and illustrating the old doctrines upon which the peculiar rights and privileges of corporations depend. Although this litigation is but remotely connected with the subject of this work, it may not be inappropriate to glance at the more obvious characteristics of the artificial persons which play such important parts in the business life of the present day. The first question is,

what is a corporation? The answer may be given in the language of an old definition; a being "that is immortal and invisible, having no conscience or soul."¹ A more modern authority more definitely describes a corporation as "a body consisting of one or more natural persons established by law, usually for some specific purpose and continued by a succession of members."² The immortality of a corporation as set forth in the old definition is a figure of speech, it may more properly be said to be of (usually) indefinite duration, it being perfectly in the power of its creator, the legislative power of the state or country, to limit its continuance to a fixed and definite period, or to leave it unlimited; and it can in no more appropriate sense be said to be immortal, than can any human government.

That a corporation is destitute of soul and conscience, means simply that in its corporate capacity, it is not a moral agent. The natural persons who compose it are in all respects, under all the moral obligations incident to their *status* as citizens, but the so-called *person* which they compose is not. It cannot be punished for crime, otherwise than by a pecuniary penalty or forfeiture. It is a person, however, in certain senses and for many purposes, and as such is included in the descriptive terms used in statutes, such as "persons," "individuals," and the like, provided of course the terms of the statute can appropriately include it.³ All this, however, is apart from the subject of this work and needs no further consideration in these pages.

Corporations, so far as it is necessary to consider them here, are created by positive law, either the constitution of

¹ *Tipling v. Pexall*, Bulstr. 233. See, also, *Sutton's Hospital Case*, 10 Coke, 32 (b).

² 1 *Bouv. Law Dic.* 367.

³ *People v. Schoonmaker*, 63 Barb. 44; *School, etc., v. Carlisle Bank*, 8 Watts, 291; *Planters' Bank v. Andrews*, 8 Port. (Ala.) 404; *Mineral Point, etc., R. R. Co. v. Keep*, 22 Ill. 9.

the state to which they owe their existence, or statutes enacted by the legislative branch of the state or general government. They are of three classes; public municipal corporations; these, so far as they are connected with official bonds, have been sufficiently treated in a preceding chapter; private corporations of a *quasi* public character, more or less connected with public interests; and strictly private corporations. The two latter classes are, with the exception of a few of British origin, wholly of legislative creation,¹ and it is of the official bonds which they are authorized to require of their agents and officers, that this chapter is designed to treat.

§ 411. Powers of corporations to exact official bonds.— As a corporation only exists by virtue of its charter or equivalent legislative grant, it is manifest that all its powers must be referred to that instrument and to that alone. It has no power whatever except those which are granted in its charter expressly or by fair implication from its terms.² Among other powers that are always either expressed in the charters of all business corporations, or may be fairly implied from them, is the power to make contracts in all matters within the scope of their general business. Another grant which is invariably made to all corporations aggregate is that of enacting by-laws. From the first of these powers a corporation derives its right to exact from its employes or agents, bonds to secure the performance of their duties by the officers; and it is the second which entitles such bonds to be classed as "official." The by-law which authorizes the exaction of a bond is, in effect, a delegation by the legislature of a portion of the

¹ Franklin Bridge Co. v. Wood, 14 Ga. 80.

² Montgomery v. Plank-road Co., 31 Ala. 76; Rochester Ins. Co. v. Martin, 13 Minn. 59; People v. Utica Ins. Co., 15 Johns. 358; 8 Am. Dec. 243; Ruggles v. Collier, 43 Mo. 353; White's Bank v. Toledo Ins. Co., 12 Ohio St. 601; Occum Co. v. Sprague, etc., Co., 34 Conn. 541; Downing v. Mount Washington, etc., Co., 40 N. H. 230.

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legislative power of the state, and to this extent and for this special purpose, the exactation of such a bond is an exercise of the sovereign power of the state. Of course, neither a by-law nor the official bond which it prescribes can be contrary to the charter of the corporation;¹ nor can it violate the constitution of the United States, nor of the state, nor the common law, nor the statutes of the state, nor acts of congress.² With these restrictions, and within the scope of the powers conferred upon it by its charter, a corporation is entitled to enact by-laws which prescribe the terms and conditions of the bonds which it may exact of its officers and agents, and such bonds being authorized indirectly by legislative sanction may be classed as official.

§ 412. Relation between a corporation and its officers and agents. — Whosoever becomes an officer or agent of a corporation, whether he is required to give a bond or not, assumes toward the corporation, and the natural persons beneficially interested in its welfare, the relation of trustee.³ And this relation, with all its consequences, pervades every rank of official persons connected with the institution. Whoever holds in his hands the money or property of the corporation, from the president down, is a trustee and liable as such. From the trust relation existing between corporation officers, and the institution and its stockholders, it results that one holding a position of trust cannot use it to promote his personal and individual interests.⁴

¹ *Kearney v. Andrews*, 10 N. J. Eq. 70; *Carr v. St. Louis*, 9 Mo. 191; *State v. Curtis*, 9 Nev. 325.

² *Mayor v. Beasley*, 1 Humph. 232; 34 Am. Dec. 346; *Butchers', etc., Asso. 35 Penn. St. 151*; *Kennebec, etc., Co. v. Kendall*, 31 Me. 470.

³ *Kohler v. Black River Co.*, 2 Black. (67 U. S.) 716; *York, etc., Co. v. Hudson*, 19 Eng. L. & Eq. 365; *Bliss v. Matteson*, 45 N. Y. 22; *Spofford v. Texas, etc., Co.*, 50 How. Pr. 522; *Butts v. Wood*, 37 N. Y. 317; *s. c.*, 38 Barb. 181.

⁴ *Butts v. Wood*, 37 N. Y. 317; *Gardner v. Ogden*, 22 N. Y. 332.

And not only are the officers of a corporation trustees for the stockholders, but also, under circumstances and in a proper case, they are trustees for creditors as well, and are consequently inhibited from deriving any personal advantage from any settlement which they may make, between the institution which they represent and its creditors.¹ These, however, are questions of corporation law, and have no further connection with official bonds than this: that if an officer of a corporation has given a bond, which is put into suit upon alleged breach, neither he nor his surety can defeat a recovery or mitigate damages by reason of any personal advantage gained by him through any such illegal use of his official position. Thus, if the cashier of a bank should use its funds to buy at a discount its outstanding obligations, he could not, in an action on his official bond, set-off such obligations at par. And notwithstanding the *strictissimi juris* privilege of sureties, they cannot mitigate their liability by use of the gains so surreptitiously made by their principal.

§ 413. Selection of officers of corporations. — The mode of selecting the officers of a corporation is usually fixed by its charter, and although the law requires that the course prescribed by the charter be strictly followed,² the matter is practically of little moment so far as it concerns official bonds. The principal and the surety in such a bond, are both estopped by it from denying that the principal is *de jure* the officer which the bond recites that he is. They cannot in this respect gainsay their act and deed. And the obligors in such a bond are equally estopped from denying the legal existence of the corporation to whom or for whose benefit it was executed.³

¹ Bliss *v.* Matteson, 45 N. Y. 22.

² Brewster *v.* Hartley, 87 Cal. 15, 24; People *v.* Runkle, 9 Johns. 147; Rex *v.* Poole, 7 Mod. 195.

³ Congregational Society *v.* Perry, 6 N. H. 164; 25 Am. Dec. 455.

§ 414. Who should sue on a bond given to a corporation. — If a bond is made to the acting officers and agents of a corporation as to the “directors, etc., and their successors in office,” a suit may properly be brought by the corporation in its corporate name; the directors, being the known and recognized legal agents of the corporation are to be regarded as its representatives in all their official acts. The rule is, that when a contract purports upon its face to have been made by or with an agent, having no direct or beneficial interest in the transaction, the suit must be brought in the name of the principal, as the contract is in legal effect made with him and not with the agent.¹

§ 415. When corporation not bound for the laches of its officers. — When a corporation has appointed an officer and taken a bond from him, it incurs no special liability with reference to that office to the obligors of the bond. The obligation is on the other side. The principal undertakes that he will, and the surety guarantees that he shall, do his duty; the corporation, as other obligees, is passive in the transaction, it is the recipient, not the actor. In consideration of the bond it confers the office and its emoluments, and least of all does it guarantee directly or indirectly to the sureties, that which *they* guarantee to it, that their principal shall perform the duties of his office. Hence, it is not responsible for the negligence of its officers, superior to the obligor in the bond; if they neglect their duty, and omit to properly supervise their subordinate, make the prescribed examinations of his accounts, or otherwise fail in the discharge of their duty, they incur liability to the corporation, but not to the subordinate officer or his sureties, and their laches imposes no obligation on the corpora-

¹ Bagley *v.* Onondaga, etc., Co., 6 Hill (N. Y.), 476; Pigott *v.* Thompson, 3 Bos. & P. 147; Gilmore *v.* Pope, 5 Mass. 491; Taunton, etc., *v.* Whiting, 10 Mass. 827; 6 Am. Dec. 124; Commercial Bank *v.* French, 21 Pick. 486; 32 Am. Dec. 280.

tion. If, however, the principal officers of the corporation act fraudulently in this respect, a different question would be presented. This subject, however, is fully considered in a subsequent chapter of this work to which the reader is referred.¹ It need only be said here that whatever liabilities may be imposed upon a corporation by the fraudulent action of its principal officers with reference to the liability of their subordinates' sureties, none whatever is incurred by the corporation from their *negligence* in this respect.²

§ 416. Corporations can contract with their own members and accept them as sureties on official bonds. — However indelicate it may be in officers of a corporation to place themselves in such a position, by becoming sureties on the bond of a subordinate, that their duty required them to pass as directors upon their own sufficiency as bondsmen, they cannot escape responsibility by reason of the impropriety. In a case of this character, Chief Justice Shaw said: "A corporation is an artificial person in law, distinct from all the individuals composing it, capable of contracting and bringing suits, and may contract with its own members or have suits against them, as well as against other persons."³ If, however, this form of liability be prohibited by statute, the bond taken in defiance of the law is void, of course, but its validity may depend upon the precise time when the bond took effect and became operative. Thus where a director signed an officer's bond, but ceased to be a director before the bond was approved by the board of directors, it was held that the bond took effect only when it was accepted, that at that time the ex-director was a com-

¹ See Chap. XIX., *post*.

² Mutual, etc., Association *v.* Price, 16 Fla. 204; *s. c.*, 26 Am. Rep. 703; United States *v.* Kirkpatrick, 9 Wheat. (22 U. S.) 720; Trent Navig. Co. *v.* Harley, 10 East, 34; Nares *v.* Rowles, 14 East, 509; Pittsburg, etc., Co. *v.* Shaeffer, 59 Penn. St. 350; People *v.* Ruddell, 4 Wend. 574; overruling People *v.* Jansen, 7 Johns. 382.

³ Amherst Bank *v.* Root, 2 Metcf. (Mass.) 522, 534.

petent surety, and the bond thus executed and accepted was a valid obligation.¹ In this case the law of the state forbade a director of a bank from becoming liable as a surety on the bond of an officer of the bank. In another case in the same state, and under the operation of the same law it was held that a director could not do indirectly, that which he was forbidden to do directly, that he could not indemnify other (competent) sureties by mortgaging his property, as a security for their liability on the officer's bond. "One cannot," says the court, "perceive the difference between directors signing directly as sureties, or indirectly by their friends, upon such directors' own responsibility; the two proceedings must amount to one and the same thing, and all the evils which the statute was intended to remedy would still exist." In this case the obligation of indemnity, and the mortgage supporting it, were held void. The validity of the bond so executed was not brought into question, of course, however, having been executed by competent sureties it was valid.²

§ 417. Illegal proceeding of corporation will invalidate an official bond designed to effect the illegal purpose.—If a corporation undertakes any line of business in violation of positive law or public policy, an official bond executed in furtherance of that illegal purpose is void and will not be enforced. Thus a foreign bank established an agency in a state, the laws of which forbade such agency, and required a bond and security from its agent. The bond was held void and the sureties of the agent were permitted to set up its illegality.³ And in like manner in Indiana, an express company which had not complied with the law, took a bond from its agent, and after default

¹ Franklin Bank *v.* Cooper, 36 Me. 179; *s. c.* 39 Me. 542.

² Jose *v.* Hewett, 50 Me. 248, 251.

³ Bank of Newbury *v.* Stegall, 41 Miss. 142; Thorn *v.* Traveler's, etc., Co., 80 Penn. St. 15.

brought suit upon the bond. The action could not be maintained. The court admitted that as between the company and its agent the latter might be held liable upon an implied assumpsit to pay over money received to the use of his principal on the ground that "if money due to a principal on an illegal transaction should be paid over to his agent for him by the party from whom it was due, * * * the principal, may recover it from the agent; for the contract of the agent to pay the money to his principal is not immediately connected with the illegal transaction; but grows out of the receipt of the money for the use of the principal. * * * But this," said the court, "is not such a suit. This is a suit upon the bond of the agent and his sureties therein; and the question is, what acts of the agent are covered by that bond? If it was executed to cover illegal as well as legal acts, the bond was void *ab initio*."¹

If, however, the alleged illegality which is assumed to have invalidated the bond, was merely the omission to comply with the requisitions of a directory statute, that omission will not render the business transacted through the agent illegal or the bond void, and the neglect of the agent himself in performing certain acts required by the directory statute, cannot be set up as a defense to the action either on his behalf or on that of his sureties.²

§ 418. Conformity of official bonds of corporation officers to the statute by which they are prescribed. — The rule in this respect, as to bonds of corporation officers and agents varies in no particular from the general law on the subject discussed in other portions of this work. A substantial compliance with the statute is all that the law requires, and variations in phraseology or minute

¹ Daniels v. Barney, 22 Ind. 207.

² Washington, etc., Co. v. Colton, 22 Conn. 42, 50.

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differences will not invalidate an obligation of this character. If the statute requires the obligation of the bond to be for "a faithful discharge of the duties of the office," the use of equivalent phrases will not invalidate the bond, nor even reduce it in grade from a statutory to a common-law bond. And if the corporation be authorized to make by-laws, any condition which might have been (under the charter) included in the by-laws, or authorized by them is admissible.¹

In general, it may be said that unless the power to exact official bonds from its officers by a corporation be specially limited and circumscribed by its charter, it can vary its terms and conditions in such a manner as may be required by the exigencies of its business. It cannot, of course, require the performance of an illegal or immoral act; if the bond required is not of this character, but differs from what the statute prescribes, and is consonant with the scope and character of the corporation, it may not be a statutory bond, but nevertheless, may be good as a common-law bond. Thus, where the condition of the bond of a cashier requires of him duties additional to those prescribed by the charter, it is invalid as a statutory, but good as a common-law bond and may be enforced as such.²

§ 419. Delivery, acceptance, and approval of official bonds of corporation officers. — Unless the charter of a corporation, or by-laws enacted under it, require a special form or mode of delivery, acceptance, or approval of bonds taken under the authority granted, the rules of law control-

¹ *Bank of Carlisle v. Hopkins*, 1 T. B. Monr. 245; 15 Am. Dec. 113. See, also, *Farmers', etc., Bank v. Polk*, 1 Del. Ch. 167; *State Bank v. Locke*, 4 Dev. 529; *Benford v. Alston*, 4 Dev. 351; *State Bank v. Armstrong*, 4 Dev. 519.

² *Franklin Bank v. Cooper*, 36 Me. 179; *Brighton Bank v. Smith*, 5 Allen, 413. See, also, *Morse v. Hodsdon*, 5 Mass. 314; *Burroughs v. Lowder*, 8 Mass. 373; *Sweetser v. Hay*, 2 Gray, 49; *Grocers' Bank v. Kingsman*, 16 Gray, 473.

ling this subject in regard to other official bonds, apply as well to the class of bonds under consideration. The rule is pretty well settled that in all cases in which there is no statutory provision to the contrary, the proof of the delivery, acceptance, or approval of a bond of this character may be made by any evidence competent to establish any other fact of like character. This subject has been fully considered in preceding chapters.¹ Indeed, it has been held that the provisions of charters and by-laws on this subject are directory, and that the fact of acceptance of the bond may be proved by evidence competent and adequate to establish any similar fact.²

§ 420. Rules controlling official bonds to corporations as modified by the organic law of the corporation. — If the organic law of a corporation limits the duration of an office, or prescribes terms which must be observed by the officer, that law enters into and forms part of the officer's contract and that of his sureties. If the charter of a bank, for example, authorizes the institution to enact by-laws, and a by-law fixes the term of the cashier at one year, and requires a bond to be given, the by-law is a part of the contract of the surety, and the bond executed in pursuance of it binds him only for one year, so that he is not liable for defaults occurring after the lapse of that year.³ Whether the provision in statute, charter, or by-law, that the officer shall hold until his successor is elected and qualified, prolongs the operation of the bond or the liability of the surety upon it, is a question which is else-

¹ *Ante*, Chap. I., II.

² *Bank of United States v. Dandridge*, 12 Wheat. (25 U. S.) 64. See, also, *Lexington, etc., Co. v. Elwell*, 8 Allen, 371; *Dedham Bank v. Chickering*, 3 Pick. 335; *Union Bank v. Ridgeley*, 1 Harr. & G. 324; *Graves v. Lebanon Bank*, 10 Bush, 23; *Engler v. People's, etc., Co.*, 46 d. 322; *State Bank v. Chetwood*, 8 N. J. L. 1; *Amherst Bank v. Root*, 2 Metc. (Mass.) 522.

³ *Harris v. Babbit*, 4 Dillon O. C. 185.

where considered ; it is sufficient here to say that the better opinion is that the liability of a surety upon an annual or other limited official bond, ceases with the term of office, and that the phrase, "until his successor shall have been elected and qualified," can only prolong such responsibility for a reasonable time after the expiration of the term, for the successor to be qualified and to take possession of the office.¹ There have been, however, respectable decisions the other way, based upon the very reasonable ground that the phrase, "until his successor shall be elected and qualified," being part of the law, was part of the contract, and that the sureties entered into their obligation with the full knowledge that, under circumstances, the tenure of their principal's office might be prolonged beyond the prescribed term.² This reasoning applies with much less force to the case of a bond of an officer of a private corporation than to the case of a bond of a public officer. If the corporation which is the beneficiary of the bond permits it to expire, fails to cause it to be renewed, or to have a successor duly qualified, it is its own fault, not that of the surety of the officer, and the loss should fall upon the party whose laches had rendered it possible. The case of a public officer is somewhat different, the *hiatus* in the security is the fault, not of the beneficiary, but of other officers who have neglected to cause the office in question to be filled and proper security taken, and the fault of its officers cannot be imputed as laches to the government.

¹ On this subject, see *Bigelow v. Bridge*, 8 Mass. 275; *Chelmsford v. Demarest*, 7 Gray, 1; *Dover v. Twombly*, 42 N. H. 59; *Welch v. Seymour*, 28 Conn. 387; *Moss v. State*, 10 Mo. 338; *State Treasurer v. Mann*, 34 Vt. 371; *Mayor, etc., v. Horn*, 2 Harr. (Del.) 190; *Insurance Co. v. Smith*, 2 Hill (S.C.) 590; *South Carolina Society v. Johnson*, 1 McCord, 41; 10 Am. Dec. 644; *Committee, etc., v. Greenwood*, 1 Dessaussure, 450; *County of Wappello v. Bingham*, 10 Iowa, 40; *Insurance Company v. Clark*, 33 Barb. 196; *Patterson v. Inhabitants of Freehold*, 38 N. J. L. 255.

² *State v. Berg*, 50 Ind. 496; *Thompson v. State*, 37 Miss. 578; *Placer County v. Dickinson*, 45 Cal. 12; *State v. Daniel*, 6 Jones (N.C.) L. 444; *Sparks v. Bank*, 9 Am. L. Reg. (n.s.) 365.

§ 421. **Same subject continued.** — In Connecticut, the rule already stated is followed in a very well considered case in which a *general* bond given by an *annual* officer, was held to be an annual bond. The officer was appointed treasurer of the corporation and re-appointed annually for several successive years. He gave a bond when first appointed, but never renewed it. The organic law of the corporation required that the directors should be, as well as the treasurer, annually appointed, and further that all the officers should hold their places “until the next annual meeting and until others should be elected in their stead.” Under these circumstances the bond of the treasurer could not be enforced so as to cover a default that took place after the expiration of his first term.¹ In Pennsylvania, in a similar case, there was a like ruling. The question was between the corporation and other creditors of the officer, he being dead and his estate insolvent. The ruling of the court was in effect that when the first term of the officer expired, the bond was *functus officio*, there being no default up to that time, that whatever liability might have occurred afterwards, could not be referred to the bond, nor be invested with the dignity of a bond or judgment debt, but must yield precedence of payment to demands that were supported by bonds or judgments. The court, after citing a number of cases in support of the rule that the obligation of an annual bond does not extend beyond the year for which it was given,

¹ Welch *v.* Seymour, 28 Conn. 387; citing, Carling *v.* Chalken, 3 Maule & Selw. 502; Dedham Bank *v.* Chickering, 3 Pick. 335; United States *v.* Kirkpatrick, 9 Wheat. (22 U. S.) 720; Evarts *v.* Killingworth, etc., Co., 20 Conn. 447; Hastings *v.* Blue Hill, etc., Co., 9 Pick. 80; Chelmsford Co. *v.* Demarest, 1 Gray, 1. The last three cases, it may be remarked, support the doctrine that an omission of an incorporated company to appoint its officers annually, does not render such officers holding over mere intruders and vacate their offices, but that they are *de facto* officers whose acts bind the corporation. The court further cites in support of the principal proposition, the well known case of Arlington *v.* Merricke, 2 Saund. 404, and the case of Kitson *v.* Julian, 30 Eng. Law & Eq. 326.

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remarks: "But it is supposed that the fact of there being sureties in many of these cases distinguishes them, and that the bond should be held good between the obligee and the obligor. It might be sufficient to reply that as to the *terms* of the bonds, there cannot be one construction for one obligor and another for the other.¹ And in Vermont, also, there has been a similar decision fully sustaining the rule that the annual bond of an annual officer covers no liability not accruing within the year for which the bond was given.²

¹ M. & M. Savings, etc., Co. v. O. F. Hall Association, 48 Penn. 446; Arlington v. Merricke, 2 Saund. 411; Liverpool, etc., v. Atkinson, 6 East, 507; Barker v. Parker, 1 Taunt. 295; Peppin v. Cooper, 2 Barn. & Ald. 431; Commonwealth v. West, 1 Rawle, 31; Commonwealth v. Reitzell, 9 Watts & S. 109; Commonwealth v. Boynton, 4 Dall. 282.

² State Treasurer v. Mann, 34 Vt. 371. See, also, Hassall v. Long, 2 Maule & Sel. 363.

CHAPTER XIII.

IMPERFECT OFFICIAL BONDS—COMMON-LAW BONDS—VOLUNTARY BONDS.

SECTION 430. What is a common-law bond—Differences between a statutory and a common-law bond.

431. When common-law bond is good—But one recovery on it permitted, and no judgment on motion.
432. Sheriff's bond given after time limited is valid as common-law bond.
433. Common-law bond good, although condition is less onerous than the law requires, and the principal obligor is a usurper.
434. Insufficient and delayed bonds—Rule in Illinois.
435. Irregular official bonds—When held sufficient.
436. Bond valid as common-law bond—Although payable to wrong obligee.
437. Estoppel of sureties—Form of bond—Wrong obligee.
438. Bonds payable to wrong obligee—Further rulings on that subject—Wrong bonds for right obligee.
439. Same subject continued.
440. Common-law bond—When not voluntary—Rule of reforming bond for mistake.
441. Who may bring suit on irregular official bond—Bonds good in part and bad in part.
442. Same subject continued.
443. Voluntary and common-law bond wholly unauthorized by statute—Who should bring suit upon it.
444. Common-law bond may be taken for the benefit of the United States, and enforced by the government.
445. When a court of equity will reform an irregular or defective bond—When it will not.

§ 430. What is a common-law bond—Differences between a statutory and a common-law bond.—The difference between a statutory or regular official bond and a common-law bond has been repeatedly alluded to in the preceding chapters of this work, but not as yet treated at

any length. It is therefore proper to say here that the regular official bond is one which is prescribed by statute, or by resolution, or by-law of an incorporated company authorized by statute to enact by-laws, and to exact from its officers and agents official bonds, which in all material respects follow and conform to the statute, resolution, or by-law. By the legislation of many of the states the obligee of such a bond is authorized by statute to enforce it, if a breach of its condition occurs, in a peculiar prescribed manner, or by a special and summary remedy. Thus the official bonds of many officers, if statutory and regular, may form the cause of action in numerous successive suits brought by different plaintiffs, each founding his complaint upon his own loss by a breach of the bond, and this process is only terminated by the satisfaction of all persons having causes of action, or the exhaustion of the penalty by the aggregate of the several judgments rendered upon the bond. Regularly these successive suits must be by the ordinary process of law, in the usual manner of enforcing obligations embodied in specialties; but in many of the states a much speedier and more summary proceeding is authorized; as by rule or motion, with prescribed notice to the defendants. In this manner successive judgments will be rendered upon an official bond in favor of parties who can establish the fact that a breach of the condition of the bond has occurred, and they have been damaged thereby. Proceedings of this character are most usually authorized with reference to the bonds of ministerial officers, such as sheriffs, constables, marshals, clerks, and other officers whose line of duty includes business transactions with many persons, and whose derelictions occasion loss or injury to numerous sufferers.

The chief distinction, therefore, between a statutory bond, strictly so called, and a common-law bond, is that the obligee or beneficiary of the former is entitled to all the special remedies and processes which are granted by statute law,

whereas the common-law or voluntary bond stands upon the footing of an ordinary contract, embodied in a bond upon condition, between man and man.¹ If by fraud, negligence, or ignorance in the draughtsman, or for any other reason, a bond intended to be a statutory bond, fails in a material respect to conform to the statute, it is not a statutory bond, but may either be valid as a common-law bond, or if very defective, altogether void. The general rule controlling this subject, it may be remarked, is that bonds intended to be official and statutory, but too defective to fulfill all the requirements of the statute, and to be entitled to the privileges appertaining to strictly official bonds, are good as common-law bonds, unless they contain provisions contrary to those which are prescribed in the statute, or in violation of other rules of law common or statutory, or of public policy.²

§ 431. When common-law bond is good—But one recovery on it permitted and no judgment on motion.— A bond intended to be official, made payable to the proper obligee, as to the state or the governor, and delivered to the officers whose duty it is to receive official bonds of that character, as to the county or inferior court, is valid as a common-law and voluntary bond, although it may in material respects fall short of being a statutory bond. It is not necessary to its validity as a common-law bond that it be delivered literally to its obligee the governor or the state. It is sufficient that it be delivered to the appropriate agent of the government, the county court or the inferior court, for the obligor, by delivering the bond, and delivering it as the law requires a statutory bond to be delivered, has adopted

¹ *Sprowl v. Lawrence*, 33 Ala. 674. See *post*, § 442.

² *Morse v. Hodsdon*, 5 Mass. 314; *Kavanagh v. Saunders*, 8 Me. 482; *McGowan v. Deys*, 8 Barb. 340; *Classen v. Shaw*, 5 Watts, 468; *Freeman v. Davis*, 7 Mass. 200; *Burroughs v. Lowden*, 8 Mass. 373; *Treasurer v. Bates*, 2 *Bailey*, 376.

the payee and receiver of it and is estopped from denying its validity. It may, however, be added that upon a common-law bond there can be but one recovery, and bonds intended to be official, and falling short of the requirements of the statute, can be enforced only according to the rules of common law, and are in no respect entitled to any special privileges accorded by statute to official bonds, such as successive actions and recoveries, or enforcements by motion or other summary proceeding.¹

§ 432. Sheriff's bond given after time limited is valid as common-law bond. — If a sheriff has been inducted into office and given a bond which is invalid as a statutory bond because executed after the expiration of the prescribed time, his sureties are nevertheless as fully bound upon it as they would have been if it had been fully in accord with the requisitions of the statute. The bond being good by the rules of the common law, the sureties are bound to see that its stipulations are fully carried into effect. Their principal *is* sheriff so far as they are concerned — they are estopped from denying his title, and have agreed that he shall well and duly perform the duties of the office. They are equally responsible for the acts and omissions of their principal's deputies as for his own misdemeanors in office.²

§ 433. Common-law bond good, though condition is less onerous than the law requires, and the principal obligor is a usurper. — It sometimes happens that a bond designed to be a statutory and official bond, falls short of the requirements of the statute in that its conditions are less onerous than those required by law. If such bond be

¹ Stephens *v.* Crawford, Gov., 3 Ga. 499, 513; citing, Branch *v.* Elliott, 3 Dev. 86; Governor *v.* Twitty, 1 Dev. 153; Williams *v.* Ehringhaus, 3 Dev. 297; Vanhook *v.* Barnett, 4 Dev. 268. See also, Stephens *v.* Crawford, 1 Ga. 574; 44 Am. Dec. 680.

² Crawford *v.* Howard, 9 Ga. 314, 318.

accepted by the proper officer through negligence or complaisance, or a worse motive, the result is that although the bond is not a strictly official bond, and entitled to the special consideration accorded to such bonds by the statutes of the state, it is a valid common-law bond, and its obligors are bound by it to the full extent of its terms; and this is true although the principal obligor is a usurper who has intruded into a public office without any right whatever to it.¹

§ 434. Insufficient and delayed bond—Rule in Illinois.—Where a justice of the peace files a bond intended to be statutory and official, but which is defective in omitting a material and substantial part of the condition, such bond is insufficient and does not entitle the party to induction into the office. And the matter cannot be amended by filing the proper bond with sufficient securities after the period prescribed for such filing has expired. Under the statute of Illinois the office becomes vacant if no sufficient bond is filed within the limited time. And neither the defect of the first bond, nor the delay in filing the second, can be cured by the approval of the clerk of the county commissioner's court. The conditions of the bond are fixed by law, and are beyond his discretion or control.²

§ 435. Irregular official bonds — When held sufficient.—It sometimes happens that obligations intended to secure the performance of official duties are made in very unusual and irregular forms. Such obligations, however, have been held valid, not only as voluntary and common-law bonds, but as sufficiently responsive to the requirements of a statute to be considered statutory or official bonds. Thus the charter of a village prescribed that certain officers, including constables, should "give such secur-

¹ *People v. Slocum*, 1 Idaho, 62.

² *People v. Percells*, 8 Ill. 57, 63.

ity * * * as the major part of the trustees of the village for the time being shall deem sufficient." Under this clause of the charter a constable with three sureties executed a sealed instrument in which they "jointly and severally agree to pay to each and every person such sum or sums of money as the said constable shall become liable for, on account of any execution which shall be delivered to such constable for collection." In an action for the enforcement of this instrument, by a person who claimed the benefit of it under its terms, the court held that the instrument was a sufficient compliance with the requirements of the charter, that the legislature did not require a *bond*, but, in the most general terms, such security as should be satisfactory to the trustees, that the trustees were to be judges not only of the sufficiency, but of the form of the obligation, and they having accepted it, it was a valid obligation operative according to its terms. It was further held that although no obligee was named in the instrument, its beneficiaries were sufficiently designated to enable one who by averment brought himself within its description, to maintain an action of covenant in his own name, and illustrates its ruling by the case of a covenant with a man and his heirs or executors. "The names of the heirs or the executors do not appear in the deed: but still they can sue upon the covenant if broken."¹

And in a later case in the same court, an instrument in writing but not under seal, signed by a constable and other persons as his sureties, purporting to bind themselves "to all persons in whose favor any executions may come for the damages in the same, if not paid over to him or them, according to the statute in such case made and provided," etc., and containing other obligations which in substance included all the duties of a constable, was held to be a valid and obligatory instrument. The court said that with refer-

¹ *Fellows v. Gilman*, 4 Wend. 414, 419.

ence to delay in filing the bond, the statute was directory to the officer who could not take advantage of his own omission, that the approval of the bond was not intended for the protection of the sureties, and its omission could not enure to their benefit, and that as to them, their signature was all that was necessary to make them liable, and that the omission of the seals was not material, and finally that the instrument was a valid agreement by the persons who executed it so far at least as execution creditors were concerned.¹

§ 436. Bond valid as common-law bond although payable to wrong obligee. — The bond of an officer, which by statute should be made payable to the chairman of the county court is valid as a common-law bond, although it is made payable to the governor, provided it is regular in other respects. And even if the appointment and qualification of the officer do not appear as they should on the records of the county court, a suit may nevertheless be maintained upon the bond. Neither the officer who acted under an irregular or defective appointment, nor the sureties who executed an informal bond, are permitted to aver against the authority under which he acted, or the regularity and validity of the obligation which they incurred.²

437. Estoppel of sureties — Form of bond — Wrong obligee. — The sureties upon an officer's bond are estopped from denying the official character of the obligees of the bond (the selectmen of a town), or of their principal as a collector of taxes, or other officer as recited in their bond. In a New Hampshire case, it is held that the recognition of these persons as holding these positions, is sufficient to show

¹ *Skellinger v. Yendes*, 12 Wend. 306.

² *Governor v. Humphreys*, 7 Jones (N. C.), 258; *Williams v. Ehringhaus*, 3 Dev. 297; *Iredell v. Barbee*, 9 Ired. 250; *United States v. Maurice*, 2 Brock. C. C. 115.

that they are officers *de facto* and not mere usurpers. And the defense, that the bond was taken to the selectmen instead of the town, was equally unavailable, because the form of the bond not being prescribed by statute, a bond to the selectmen was in effect a bond to the town, and in any event the bond, even if voluntary, was valid as a common-law bond.¹ But in Massachusetts, if a bond purporting to be statutory and official, is made payable to official persons whom the statute does not authorize to become its obligees, the successors of such obligees can maintain no action upon it. The same point has been repeatedly adjudged in other states. In North Carolina, where a statute directed that a sheriff's bond should be given in the penal sum of \$2,000 to the governor and his successors, it was held that a bond given in a different penal sum, could not be sued in the name of the governor's successor.² In Tennessee, a bond given by a clerk of a court to the governor and his successors in office, which was not a statutory bond, was put in suit by the successor of the obligee; but it was decided that the suit could not be maintained.³ In Alabama, where the statute required a collector's bond to be made payable to the governor and his successors, and it was made payable to the judge of the county court or his successors, it was decided that the judge's successor could not maintain an action on it.⁴ In several of these cases the bonds were good at common law, though they did not conform to the statute which directed or authorized them to be taken.⁵

¹ *Horn v. Whittier*, 6 N. H. 88, 94; *United States v. Tingey*, 5 Pet. (30 U. S.) 115; *Moore v. Graves*, 3 N. H. 408.

² *Governor v. Twitty*, 1 Dev. 153.

³ *Jones v. Wiley*, 4 Humph. 146.

⁴ *Calhoun v. Lunsford*, 4 Porter, 345. See, also, *Hibbets v. Canada*, 10 Yerg. 465; *Stuart v. Lee*, 8 Call, 364.

⁵ *Stevens v. Hay*, 6 Cush. 229, 332; *Treasurers v. Bates*, 2 Bailey, 378; *Jansen v. Ostrander*, 1 Cow. 670; *Kenney v. Etheridge*, 3 Ired. 360; *Polk v. Plummer*, 2 Humph. 500; 37 Am. Dec. 566; *Pickering v. Pearson*, 6 N. H. 559; *Overseers, etc., v. Sears*, 22 Pick. 126; *Cutts v. Parsons*, 2 Mass. 440; *White v. Quarles*, 14 Mass. 451.

§ 438. Bonds payable to wrong obligee — Further rulings on that subject — Wrong bonds for right obligee. — It would seem that it is not only necessary that the bond be made payable to the right official, but it must be the right bond for that official. Thus, a bond which is not a probate bond made payable to a probate judge and his successors cannot be sued on by his successor.¹ And in Maine, where one statute authorized suits on bonds given to the town treasurer to be brought in proper cases by his successors, and another statute required the collector's bond to be made payable to the town, it was held that a collector's bond made payable to the town treasurer cannot be sued by his successor, for the obvious reasons that the bond was not in conformity with the statute, that it was erroneously made payable to the treasurer, that his successor was not a party to it and had no interest in it, and that such successor could not prosecute the suit as a trustee for others because he was not a trustee, either by statute or by implication.² Public officers can maintain actions as successors "only when expressly provided by statute."³ There are like rulings in North Carolina,⁴ in Tennessee,⁵ in Alabama,⁶ and in Virginia.⁷ Bonds thus defective, it may be remarked, are good at common law, and although an action cannot be maintained by the successors, the obligees themselves and their personal representatives may enforce them by suit.⁸

¹ *White v. Quarles*, 14 Mass. 451.

² *Lord v. Lancey*, 21 Me. (8 Shepley) 468.

³ *Overseers, etc., v. Sears*, 22 Pick. 126.

⁴ *Governor v. Twitty*, 1 Dev. 153.

⁵ *Jones v. Wiley*, 4 Humph. 146; *Hibbett v. Canada*, 10 Yerg. 465.

⁶ *Calhoun v. Lunsford*, 4 Porter, 345.

⁷ *Stuart v. Lee*, 3 Call, 364. But see *Horn v. Whittier*, 6 N. H. 88; *Tyler v. Hand*, 7 How. (48 U. S.) 573.

⁸ *Sweetser v. Hay*, 2 Gray, 49; *Horn v. Whittier*, 6 N. H. 88; *Governor v. Allen*, 8 Humph. 176; *Vanhook v. Barnett*, 4 Dev. 268; *Justices, etc., v. Smith*, 2 J. J. Marsh. 472; *Thomas v. White*, 12 Mass. 369.

§ 439. Same subject continued.—If a bond which by statute is required to be made payable to a named political organization, is made payable to another and wholly different body politic, the former can maintain no action upon it. Thus, where an officer was required by law to give a bond to the township, and instead thereof executed a bond payable to the “people of the state of Michigan,” the township could maintain no action upon it, and the averment in the declaration that the obligors bound themselves to the plaintiff by the name of “the people of the state of Michigan,” was unavailing, because the court was bound to take judicial notice of the difference between the township and the state, and the averment in the declaration was inconsistent with the bond.¹

§ 440. Common-law bond—When not voluntary—Rule of reforming bonds for mistake.—When without the sanction of any statute, the selectmen of a town (or other equivalent subdivision of a state) require of the collector of taxes for the town, a bond with security for the faithful discharge of his duty, such a bond will not be regarded as voluntary by a court of chancery, that court having obtained jurisdiction of the subject by a bill asking the correction of a mistake in the execution of the instrument.² And it would seem that a court of equity will upon the ground of mistake (in the omission of a seal), take jurisdiction of the case and in effect reform the instrument, giving it the immunity from defenses of a failure of consideration that it would have had at law if it had been sealed. “The plaintiffs,” said the court, “are entitled to a bond the consideration of which cannot be inquired into at law,” and this the court will give them.

§ 441. Who may bring suit on irregular official bond—Bonds good in part and bad in part.—In Tennessee when a

¹ *Town of La Grange v. Chapman*, 11 Mich. 499.

² *Montville v. Henghler*, 7 Conn. 543, 548; *Monell v. Sylvester*, 1 Me. 248.

statute directs bonds for the public benefit to be made payable to the governor or other functionary having legal succession, the office is the payee, and the successor whether or not described *eo nomine*, either in the statute or bond, may yet maintain the action, such officer being made by form of the statute, and for the public benefit, *quoad hoc*, a corporation sole. And, further, if a bond otherwise in conformity to the law has other stipulations different from those pointed out by the statute, these stipulations may be void, and if so do not invalidate the remainder of the bond, for bonds may be good in part and invalid as to the residue, when that residue is founded on illegality and not *malum in se*. And if the illegality in the provisions of a bond arises from their direct contravention of statutes, the illegal parts of the bond will not invalidate the remainder unless the statute expressly or by necessary implication annuls the whole instrument to all intents and purposes.¹

§ 442. Same subject continued — Rule in Alabama. — Regularly an action on an official bond should be brought in the name of the obligee, but where that party is the state or sovereignty, or the governor, or other official personage representing the sovereignty, the action is brought in the name of such state or official “ upon the relation ” or “ to the use ” of the real party in interest, or person damned by the breach of the condition of the bond. In Alabama, when a bond is made payable to the wrong obligee, as to the state instead of the county, the statute gives to the “ person aggrieved ” all the remedies which he might have maintained on a regular statutory bond, in all cases where the officer executing such informal bond has acted under it.²

¹ *Polk v. Plummer*, 2 Humph. 500; 37 Am. Dec. 566; *United States v. Bradley*, 10 Pet. (35 U. S.) 343; *Newman v. Newman*, 4 Maule & S. 66; *Supervisors v. Van Campen*, 3 Wend. 48; *Hibbets v. Canada*, 10 Yerg. 465.

² Rev. Code Ala. (1876) §§ 171, 181; *Sprowl v. Lawrence*, 33 Ala. 674; *Lewis v. Lee County*, 66 Ala. 480.

§ 443. Voluntary and common-law bond wholly unauthorized by statute — Who should bring suit upon it. — It sometimes happens that an officer appoints an agent and delegates to him the discharge of a part of his official duty, taking his bond for the due performance of the contract. In such a case the bond so taken is not in any proper sense a statutory or official bond, being prescribed by no law. If such a bond is put into suit it must be in the name of its obligee, the official named in it, and although the state may be the ultimate recipient of the money recovered, it is no proper party to the action. Thus, a comptroller appointed an agent and empowered him to collect certain taxes, taking a bond for the due discharge of his duty. Suit was brought on the bond in the name of the comptroller and of the state. There had been no assignment of the bond to the state, and it was held that the state was not a proper party to the suit, but that although the collection of the taxes at all being distinctly illegal, the sureties were estopped by their bond, from resisting on that ground a recovery of the money collected.¹

§ 444. Common-law bond may be taken for the benefit of the United States, and enforced by the government. — It has been elsewhere said that the United States, as a body politic, can enter into general contracts, without the sanction of an act of congress and enforce such contracts.² It may be added here that such contracts may assume the character of a conditional bond, which if duly executed upon a valid consideration, will be enforced, although it may not have been prescribed by statute, or if so prescribed, may not have been in its terms and conditions in conformity with the statute, or may have been without a seal.³ And in like

¹ Galbreath *v.* Gaines, 10 Lea, 568.

² United States *v.* Tingey, 5 Pet. (30 U. S.) 115; United States *v.* Bradley, 10 Pet. (35 U. S.) 348.

³ United States *v.* Linn, 16 Pet. (40 U. S.) 290; United States *v.* Hodsdon, 10 Wall. (77 U. S.) 395.

manner, a bond which was not prescribed by act of congress, made payable to the United States, conditioned that the principal obligor would pay for revenue stamps furnished to him on credit, was held to be a valid common-law obligation, and could be enforced. Such an action might be supported by any competent evidence, and any evidence was competent which tended to show that the obligor was indebted to the United States for revenue stamps, and it was wholly immaterial whether the stamps were furnished by the assistant treasurer, or the commissioner of internal revenue.¹

§ 445. When a court of equity will reform an irregular or defective official bond—When it will not.—It is a well known power of courts of equity to reform irregular and defective obligations and other instruments, and its jurisdiction in this regard has been very freely exercised. Like all other great authorities, however, courts will draw the line somewhere. They will exercise their function of reforming written instruments so as to make a valid contract operate according to the intent of the parties, but will not give validity to that which is void upon its face. To reform a written contract, there must be a contract to reform, and the court in Oregon, held that an official bond of an administrator, without any penalty expressed in it, or any blank left for such a penalty, was just such a *no-contract*, that the persons who executed the instrument bound themselves to nothing by it, that if there was any contract it was a parol contract which the court could not, by inserting a penalty in the so-called bond, render obligatory, without, so far as the sureties were concerned, violating the statute of frauds, by charging a surety on his parol agreement.²

¹ Jessup *v.* United States, 106 U. S. 147.

² Evarts *v.* Steger, 6 Oregon, 55, 60; Church *v.* Noble, 24 Ill. 291; Lindley *v.* Smith, 58 Ill. 250; State *v.* Boring, 15 Ohio, 507.

CHAPTER XIV.

PENALTY AND BREACH OF CONDITION OF OFFICIAL BOND.

SECTION 450. What is a breach of the condition of an official bond.

451. When penalty of an official bond is valid although not in accordance with the statute.
452. When the penalty of an official bond is a penalty, and when a forfeiture.
453. The breach of an official bond—Application of general principles to special cases.
454. Breach of bond is complete, and cause of action accrues upon non-payment of public funds.
455. Death of principal obligor—When a breach of his bond.
456. When remote damages recoverable for the breach of an official bond.
457. Default in duty not within the purview of bond, is no breach of its condition.
458. When the breach of an official bond which operates as a contract of indemnity is complete.
459. Non-payment on demand, a breach of official bond.
460. No breach of bond where there is no violation of duty.
461. What is not a breach of an official bond—Malfeasance and misfeasance.
462. What is not a breach of an official bond—Surety—Official act.
463. Receiver's bond—What is a breach of such a bond—Surety.
464. What is a breach of a bond conditioned for the safe keeping of the public money.
465. Officer not liable on his official bond for his deputy's breach of a penal statute.
466. Deputy's bond—Reappointed deputy—When a deputy liable on his official bond.
467. Omission of duty by officer at the instance of plaintiff in an execution is not a breach of the officer's bond.
468. To whom officers and their sureties on their official bonds are liable—Plaintiff must prove breach as to him.

§ 450. **What is a breach of the condition of an official bond.**—It has been sufficiently shown, in preceding

chapters of this work, what is the penalty of a bond, and what are the general characteristics of the condition upon the breach of which the bond becomes absolute, and the amount of the penalty (technically) a fixed and ascertained debt. The remaining question involved in this connection is, what will constitute a breach of an official bond. It may be here remarked that the conditions of bonds, like all other legal instruments, must receive a fair and reasonable construction, subject however, to the rule heretofore stated,¹ that "if it (the bond) has a condition annexed to it, which is doubtful, as that it is for the ease and favor of the obligor it is to be taken most strongly in his favor." With this exception the rule is that the construction must be equal and impartial, the scales of justice must be evenly poised, and due effect given to whatever may turn the scale, irrespective of all considerations of favor on the one side or hardship on the other. For the rest, it may be said generally that whatever, connected with the subject matter, which may be done or omitted by the obligor, or the person for whom he is bound, which defeats, or tends to defeat the object for which the bond was exacted, which is either expressed in the condition or fairly to be implied from its terms, whatever puts into jeopardy the rights of the obligee, militates against his interests, or impairs his remedy, constitutes a breach of the bond, provided such act or omission is in contravention of the true intent and meaning of the condition.

It is the purpose of this chapter to show what will constitute a legal and appropriate penalty to an official bond, when the penalty is illegal and invalid, and what will and what will not be regarded as a breach of the condition of such a bond.

§ 451. When penalty of an official bond is valid although not in accord with the statute.—It is not of

¹ *Ante*, § 131.

the essence of an official bond that the amount of the penalty shall be prescribed by the statute which authorizes the exaction of the bond. If the statute is silent on the subject the amount of the penalty may be fixed by the proper officer. In such case, the liability of the sureties would be limited to the amount of the penalty so inserted in the bond by the officer by whom it was required. And in a Nebraska case, it has been held that if no specific penalty be inserted in the bond, and the obligation of the sureties was otherwise sufficiently explicit, they would be liable for the full amount of the loss or injury sustained.¹ And in this connection it may be remarked that the fact that the penalty of an official bond is for a sum several thousand dollars in excess of the amount prescribed by the statute, in no degree impairs its validity.² In cases of this character, courts very readily avail themselves of the rule that instruments shall be so construed *ut res magis valeat quam pereat*, and hold that parties, who have bound themselves for more than the law requires, may be held responsible to the extent of their legal liability, and discharged from the illegal excess.

§ 452. When the penalty of an official bond is a penalty, and when a forfeiture.—It has already been said that the question when a penalty of a bond is a *penalty*, and when it is a forfeiture or a declaration of liquidated damages, can seldom arise in the case of a strictly official bond. It frequently occurs, however, in cases of bonds upon condition not absolutely and technically official. The general rule is that in all instruments which assume the form of a conditional bond, the sum stipulated to be paid upon a breach, will be construed as a penalty, but this is not universally true. Where a penalty or forfeiture is pre-

¹ *Noble v. Himes*, 12 Neb. 193.

² *In re Read*, 34 Ark. 239; *Graham v. Commrs. Jefferson County*, 66 Ind. 886.

scribed by a statute, and the obligation for it is embodied in a bond, courts of equity will not mitigate the forfeiture, because that would be in contravention of the legislative will.¹ "Cases of agreements and conditions of the party, and of the law, are certainly to be distinguished. You can never say that the law has determined hardly, but you may that the party has made a hard bargain."² Thus in cases in which penalties and forfeitures are incurred by violations of the revenue laws of the United States, courts of equity will rarely or never interfere, because in doing so they would virtually repeal a statute or defeat its operation.³ In cases where bonds are given not to defraud the revenue, a breach is considered in law as a crime, and "this court," says Lord Hardwicke, "will not relieve for that reason."⁴ The fact that the obligation is in the form of a bond to the state, does not make the penalty less a statutory forfeiture, and so outside the jurisdiction of a court of equity. It has been held that in a bond given in pursuance of an act of congress with sureties, and conditioned that the registry of a vessel should only be used for the vessel to which it was granted, the penalty named was not an ordinary penalty limiting the maximum of damages to be recovered, nor yet a liquidation of damages recoverable upon a breach of a contract, but a *forfeiture* inflicted by the sovereign power for a breach of its laws.⁵ It is manifest, therefore, that where a bond is executed in pursuance of a statute, the proper construction of which fixes the character of the penalty as a punishment, it can in no wise be mitigated by courts either of law or equity. The penalty as such is a

¹ Clark *v.* Barnard, 108 U. S. 457.

² Peachy *v.* Duke of Somerset, 1 Strange 447, 453

³ Powell *v.* Redfield, 4 Blatchfd. C. C. 45, 49.

⁴ Benson *v.* Gibson, 3 Atk. 395. See, also, Treasurer *v.* Patten, 1 Root. 260; Keating *v.* Sparrow, 1 Ball & B. 367, 373.

⁵ United States *v.* Montill, Taney Dec. C. 47.

fine fixed by statute, and neither a penalty in its ordinary sense, nor yet an agreement liquidating damages.

And not only is a penalty *not a penalty*, when it is a fixed forfeiture for a violation of public laws, and when it is an agreed ascertainment of damages, but it is not to be taken as merely fixing the maximum of damages in a case where a bond is given to the proper officer of a state, in pursuance of a statute of that state, prescribing the bond, the penalty, and the condition, the latter being that the obligor should complete a certain railroad within a specified time, the terms of the statute evidently indicating that the penalty was to be a *forfeiture* for the failure to complete the railroad. The supreme court of the United States in adjudicating this case says, that the sum named in the statute is imposed by it as a statutory penalty for the non-performance of a statutory duty. It is somewhat difficult to see how this differs from a statutory ascertainment or liquidation of damages for the non-performance of that duty, and yet the court says, that the question of damages or compensation, "could not have been in the contemplation of the parties. There was no room for supposing that there could be any."¹

§ 453. The breach of an official bond — Application of general principles to special cases. — Official bonds rarely come before courts either incidentally or as the subject matter of the litigation, except in consequence of an alleged breach of their conditions. What constitutes such a breach is, therefore, in all cases affecting the subject, the critical question.² In a preceding section will be found a brief statement or definition of such a breach, which embodies the principles controlling the subject; and the application of those principles to the circumstances of particular cases, constitutes a large and important branch of the law, involv-

¹ Clark *v.* Barnard, 108 U. S. 436, 461.

² *Ante*, § 450.

ing immense interests, public and private. When an officer receives trust funds which it is his duty to retain subject to an order of the court, it is necessary for him to keep such funds separate from his own money, so that during his lifetime or after his death, the one can be easily distinguished and separated from the other. If this is done there can be no charge of conversion, and no breach of the bond. If the officer deposits the money in bank, to his own credit, he becomes liable for the fund, but if he make such deposit to the credit of the trust in a bank in good standing, he is not liable for its loss, if any such loss there may be, and there is no breach of his bond. If, not depositing at all, he keeps the money separate from his own, there is no conversion, and no breach of his bond. In an Arkansas case, a sheriff was directed to retain a certain sum of money until further order by the court. Before any such order was made the sheriff died, and suit was brought against the sureties on his official bond, charging that the deceased had wasted and converted the fund in his lifetime, whereby there was a breach of his bond, and in another count, that he had so intermingled the fund with his own money that it could not be distinguished and separated, and this too was charged to be a breach of the bond. Upon demurrer the court held that if he had kept the money separate and apart from his own money, there was no conversion in his lifetime and no breach of his bond, but if he so mixed the fund with his own money that the administrator could not distinguish one from the other, there was a conversion and a breach of the bond.¹

§ 454. Breach of bond complete, and cause of action accrues upon non-payment of public funds. — Where it is the duty of an officer to receive public dues in the shape of

¹ State, use, etc., *v. Roberts*, 21 Ark. 260; *Wren v. Kirton*, 11 Ves. 380; *Draper v. Joiner*, 9 Humph. 614.

fees and after deducting the amount of his own compensation, to pay over to the government the surplus, his neglect and refusal to do so, constitutes of itself a breach of his official bond and imposes upon his sureties a present liability for it, so that there is no necessity to proceed against the principal in the bond, in an action for money had and received. An action on the bond may be commenced at once without a judgment against the delinquent officer.¹ And this, it may be remarked, is the rule in all cases in which the language of the bond will not authorize a different conclusion, as where the undertaking is in the alternative, as that the principal shall perform the duties *or* pay the damages, in that case a suit against the principal is necessary to ascertain judicially the non-payment of the damages, and by doing so complete the proof of the breach of the bond.

§ 455. Death of principal obligor — When a breach of his bond. — The death of the principal obligor in an official bond has, under certain circumstances, been held to operate as a breach of his bond and subject his sureties to liability upon it. In Indiana, a school commissioner gave a bond, one condition of which was that he would, at the expiration of his term, pay to his successor the money then remaining in his hands. He died during his term, and suit having been brought against his sureties on his bond, judgment was rendered against them. The court decided that the meaning of the condition was that the officer should, when his service ended, no matter how or when, pay over the money then in his hands, and that his sureties were liable if he failed to do so. This ruling is as gross a case of judicial legislation as can easily be found in the books. The obligation of the sureties was as clear and unambiguous

¹ United States v. Babbitt, 5 Otto (95 U. S.), 334, 336; s. c., 4 Myers' Fed. Dec., § 253, 254.

as it is possible for words to make it. The condition was that the officer should faithfully discharge the duties of his office "during his continuance in office, and would at the expiration of his term of service pay over to his successor in office all moneys," etc. The breach assigned was that the officer did not in his lifetime, nor did the sureties after his death, pay over the money, etc. The first answer is that the officer was not bound to pay the money in his lifetime, his term had not expired; the second is that the sureties were not bound to pay over the money after his death; their obligation was that their principal should, at the expiration of his term, pay over the money to his successor in office. That had been rendered impossible by the act of God. They were not bound for impossibilities. The court decides the case upon what it thinks was in the contemplation of the legislature, but the sureties were entitled to a fair construction of their bond, with due recognition of the *strictissimi juris* rule. It was manifestly a *casus improvisus*, and the public should have suffered the loss, not the sureties.¹

§ 456. When remote damages recoverable for the breach of an official bond.—It is a breach of a clerk's official bond to refuse or neglect to issue process when duly and legally required to do so by the party entitled to it; and if by such refusal or neglect the defendant in the deferred process becomes entitled to the defense of prescription or limitation, that fact is an element of damages in a suit upon the clerk's official bond. In such a case it does not lie in the mouth of the clerk and his sureties to say that the defendant will not plead the prescription or limitation, the presumption in such a case is that he will, and the burden of proof is upon them to rebut it.² It may well be questioned whether the damages resulting

¹ *Allen v. State*, 6 Blkfd. (Ind.) 252.

² *Anderson v. Johett*, 14 La. Ann. 614.

from the plea of prescription in such a case are not too remote to be taken into consideration. The delay did not deprive the plaintiff of his cause of action, the prescription was a matter of defense or avoidance, of which the defendant might or might not avail himself, or might or might not have disabled himself from using, by promises to pay or otherwise, and it is believed that the possibility or probability of such a defense was too remote to constitute an element of damages.

§ 457. Default in duty, not within the purview of bond, is no breach of its condition. — If the bond of a constable is simply conditioned that he “shall faithfully perform all the duties of a constable in the service of all civil process that may be committed to him,” it is not broken by the officer’s failure to pay over to the plaintiff the money paid to him by the defendant after the service of process and before the rendition of a judgment. His official duty terminated with the service of the process. He was not authorized by his precept to settle the action or collect the amount of the debt. Whatever he may have done in that connection was as the private agent of either the plaintiff or defendant, and his sureties on his official bond are not responsible for it. To make them liable for collections made by the officer, other than those made by virtue of operative final process, there must be either an express statute or an equally obligatory undertaking in the condition of the bond itself.¹ And in this case the peculiar language of the bond precluded all liability of the sureties for the loss suffered by the plaintiff.

§ 458. When the breach of an official bond which operates as a contract of indemnity is complete. — Official bonds are contracts of indemnity, and it depends upon the nature of the obligor’s undertaking, when the liability is

¹ City of Boston *v.* Moore, 3 Allen, 126.

incurred and the breach is complete. In a very thoroughly considered case in New York, the rule is laid down that when the obligation is to do a certain thing, or to save the obligee from a liability, the breach occurs whenever there is a failure to do the stipulated thing, or the charge guaranteed against becomes fixed. But if the undertaking is that the obligors will indemnify the obligees against damage or molestation, by reason of any act done or omitted in the matter in question, by the party whose good conduct is guaranteed, the breach is not complete until some actual damage is sustained. In a contract of the former character an action may be instituted as soon as the prohibited act is done, or the prescribed duty omitted, without reference to the actual damage, and in such a case, *non damnificatus* is not an admissible plea. In a case of the latter description, however, the breach is not complete, and no action can be brought, until the obligee has suffered actual damage, and, of course, *non damnificatus*, or other like plea, denying the existence of the cause of action is admissible. Upon this principle it was held that the condition of a deputy sheriff's bond to his principal, "that the said sheriff shall not sustain any damage or molestation whatsoever, by reason of any acts," etc., was not broken until the obligee had sustained actual damage.¹

§ 459. Non-payment on demand, a breach of officer's bond.—The breach of an official bond occurs whenever the officer either refuses or fails for a reasonable time to perform the duty which the condition of the bond requires. Thus, where a creditor made a demand of a constable for money collected by him, and was answered that he, the constable, had neither the money nor the papers with him,

¹ *Gilbert v. Wiman*, 1 N. Y. 550; *Rockefeller v. Donnelly*, 8 Gowen, 623; *Chase v. Hinman*, 8 Wend. 452; *Kip v. Brigham*, 7 Johns. 168; *Warwick v. Richardson*, 10 Mees. & Wells. 284; *Thomas v. Allen*, 1 Hill, 145; *Churchill v. Hunt*, 3 Denio, 321; *Cutler v. Southern*, 1 Saund. 116—note.

and after a delay of over two months, suit was instituted on the officer's bond, it was held that the breach of the bond was complete before the suit was brought, and that it was the duty of the officer to seek the creditor and pay him the money within a reasonable time after the demand.¹ And if a constable gives his receipt for notes or other claims, a short time before his term of office expires, and afterwards refuses to account for them, his sureties on his official bond are liable for his default. The liability of sureties of such officers extends to all their official engagements undertaken during the term of office included within the period covered by their official bond. Whenever an officer of this description receives claims for which he gives a receipt, the liability of his sureties attaches immediately, and is not discharged until the officer has denuded himself of his trust by collecting and paying over the money, or by the legal return of *nulla bona* to an execution upon such claims, or by the return of the claim to its owner, if that is permitted by the statute of the state and embodied, as is usual, in the receipt of the officer, or by the execution of a substitute bond with other sureties.²

§ 460. No breach of bond where there is no violation of duty — Executor. — When a bond was given by a commissioner appointed by a court of equity to sell land, and by its terms he was bound to discharge all such duties as might be imposed upon him by the decrees of the court, if there was no decree directing him to pay the proceeds to the heirs, his failure to do so is no breach of his bond and should not be assigned as such. And if the commissioner committed no breach of his bond during his lifetime and died leaving his trust but partially executed, no duty whatever with reference to his trust devolves upon his executor,

¹ Wills v. Sugg, 3 Ired. L. 96.

² State v. Johnston, 7 Ired. L. 77.

who is not bound to collect the sale money remaining due at the death of his testator nor liable for a failure to collect it.¹

§ 461. What is not a breach of an official bond — Malfeasance and misfeasance. — The sureties in an official bond are ordinarily responsible only for defaults of their principal in the nature of misfeasance in office, and not generally for malfeasance, unless such malfeasance also includes a misfeasance, as where a sheriff should wantonly destroy property levied on by him. If the officer commits a fraud, however flagrant, which does not include an omission of his official duty, his sureties are not liable, although he is. For example, a sheriff having levied an attachment upon property adequate to its satisfaction, represented to the plaintiff that he had not been able to find any such property, that the defendant had nothing, and by these means procured an assignment of the attachment debt to himself for an almost nominal sum. It was held that for this conduct flagitious though it was, his sureties were not liable, for they had not stipulated to be answerable for his wrongful and fraudulent misrepresentations, which the court regarded as his private, personal, and individual cheatery.²

§ 462. What is not a breach of an official bond — Surety — Official act. — The liability of the surety in an official bond is limited to his principal's acts. Whatever he may do extra-officially, however seriously it may affect the interest of other parties, in no degree compromises his surety, who, standing upon the terms of his obligation, cannot be drawn into any other or further liability. Thus, a sheriff having attached property under process, and having, with the consent of the plaintiff and defendant, but without any order of court, sold the property, was undoubtedly liable individually to the plaintiff for the proceeds of the

¹ *Turpin v. McKee*, 7 Dana, 301.

² *Governor v. Hancock*, 2 Ala. 728.

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sale, but his surety in his official bond was not, for his liability is limited by his obligation to moneys received by his principal officially, while acting in accordance with the law and in obedience to its requirements.¹

§ 463. Receiver's bond — What is a breach of such a bond — Surety. — A receiver's bond given in pursuance of the order of a court of competent jurisdiction, is given in pursuance of law, notwithstanding a statute invalidating bonds taken by officers, by color of office, in cases in which such bonds are not provided for by law.² And if such a bond be made payable to the clerk of the court designating him by the name of his office, but without words of succession, the bond is nevertheless payable to him officially if it appears that such is the intention of the parties, and the object of the transaction. On this point the terms of the bond and the recitals of the record are adequate and competent evidence. The rule that such designation is a mere *descriptio personæ*, is not so rigid that it will not yield to the evident purpose of the instrument. And it is a sufficient breach of the contract, embodied in such a bond, to show that the receiver was ordered by the court to make certain payments to the plaintiff in the action, and had been adjudged in contempt for his failure to do so. It is not necessary for the plaintiff to allege that the receiver had the means to pay such orders. That he had not such means, if such was the fact, or that for any other reason he should be excused from making such payments, are matters of defense.³

§ 464. What is a breach of a bond conditioned for safe keeping of public money. — In Massachusetts, it is held that a town treasurer and collector is liable absolutely for

¹ Governor *v.* Perrine, 23 Ala. 807, 808.

² Titus *v.* Fairchild, 49 Jones & Sp. 211; Gerould *v.* Wilson, 81 N. Y. 578.

³ Titus *v.* Fairchild, 49 Jones & Sp. 211, 220; Scofield *v.* Churchill, 72 N. Y. 565.

for all money that he has actually received, although it has been lost by theft without fault or negligence on his part. The court says: "His obligation is not regulated by the law of bailments. * * * He is a debtor, an accountant bound to account for and pay over the money he has collected. The loss of his money, therefore, by theft or otherwise, is no excuse for non-performance; this is founded on the nature of his contract and considerations of public policy." The distinction which pervades all the cases on this subject seems to be that if the custodian is entrusted with the money, for the mere purpose of safe keeping and delivery, and is required to pay over or deliver identically that which he has received, it is a bailment; the bailee is liable for a conversion if he makes any use of it, but if he does not, he can avail himself as a defense of a loss by irresistible force or other casualty that excludes any default on his part; if, however, upon the receipt of the money, he becomes a debtor for the amount, the identity of the money received is lost in the general fund of the officer's money, it is not a conversion for him to use it (unless that is specially prohibited by statute), and he and his sureties are liable absolutely for the money as for a debt, howsoever blameless the officer may have been in the manner of its loss.¹

And in Minnesota, there was a like ruling, that in that state, the construction of an official bond of which a condition is that the obligor shall *safely keep* public (or other) money, is strict and literal, and the responsibility of the obligor is absolute. The loss of public funds by burglary or robbery is a breach of the official bond, and howsoever innocent the officer may have been, he is in no degree relieved by the manner in which the disaster occurred.²

¹ Inhabitants of Hancock *v.* Hazzard, 12 CUSH. 112; United States *v.* Prescott, 3 HOW. (44 U. S.) 578; Inhabitants of Colerain *v.* Bell, 9 METCF. (Mass.) 499.

² County of Redwood *v.* Tower, 28 MINN. 45; County of Hennepin *v.* Jones, 18 MINN. 199; County of McLeod *v.* Gilbert, 19 MINN. 214.

§ 465. Officer not liable on his official bond for his deputy's breach of a penal statute.—It is well known that the sheriff and the securities on his official bond are liable for the acts and omissions of the former's deputies. This liability, however, is strictly civil, and cannot be enforced for a fine or forfeiture of a penal character prescribed by a penal statute and sought to be enforced by summary process by motion. Thus, a statute prescribed a fine of \$500 for making a false return by any sheriff, deputy, coroner, or other officer to be recovered by motion. Upon a motion against a sheriff and his sureties for a penalty of this character for a false return made by the sheriff's deputy, it was held that the statute was penal and could not be extended to persons not within its scope, that the deputy who was in fault was liable, and that the sheriff was not.¹

§ 466. Deputy's bond — Reappointed deputy — When deputy liable on his official bond.—It is a well settled principle of law that an officer who begins the execution of final process must complete it. Upon this principle the deputy of an out-going sheriff is responsible with his sureties for money collected by him upon process put into his hands during his principal's term of office, part of the money having been collected before the sheriff's resignation and part after it, the deputy having been continued in office by the sheriff's successor. The court said that "the successor of the plaintiff could never be answerable for this misconduct. He had no means of even knowing that such precepts had been delivered to" the deputy. In making the last collection the deputy was acting as the deputy of the first sheriff, who is by law charged with the duty of completing the execution of process begun but not finished.²

¹ *State v. Nichols*, 39 Miss. 318. See, also, *Foote v. Van Zandt*, 34 Miss. 40.

² *Larned v. Allen*, 18 Mass. 295.

§ 467. **Omission of duty by officer at the instance of plaintiff in an execution, is not a breach of the officer's bond.** — The breach of an official bond consists usually in willful or negligent disregard or omission of duty by the principal obligor or his regular deputy. If an officer charged with a duty enuring to the benefit of a party, who permits or requests a deviation from the ordinary routine of the officer's duty, and loss ensues in consequence of the deviation, the irregularity is not a breach of the officer's bond.

Thus, a sheriff, who, induced by the request of the plaintiff in an execution, appointed a special deputy named by the plaintiff, who failed to discharge his duty, was not liable upon his bond for the default of the special deputy.

The special deputy so nominated at the request of the plaintiff became the plaintiff's private agent, for whom the sheriff was not officially bound. The general rule in all such cases is well settled that the penalty of an official bond, cannot be invoked where the plaintiff has done anything directly or indirectly to mislead the officer. If the special deputy is appointed upon the promise that the officer shall have no more trouble with the matter, he has a right to regard the business as taken out of his hands and to relax his vigilance.¹ In Kentucky, a sheriff was excused for a failure to return an execution, when the plaintiff upon being told by the sheriff that the defendant was insolvent, replied that "he did not wish to be put to further expense."² In Ohio it is said on the subject of the liability of an officer on his official bond, for a failure to return an execution which was irregular and wrongful, that "he

¹ *Skinner v. Wilson*, 61 Miss. 90; *Stone v. Chambers*, 1 Strobb. 117; *De Moranda v. Dunkin*, 4 Term. 119; *Hamilton v. Dalziel*, William Blackst. 952; *Semmes v. Quinn*, 58 Miss. 341.

² *Bassett v. Bowman*, 3 B. Monr. 325.

who invokes the statute, must bring himself within both the letter and spirit of the law.” The court regarded the statute which held a sheriff liable in such a case as highly penal, and required a strict compliance with the terms of the law.¹ And where a deputy marshal, under the instructions of plaintiff’s attorney, permitted the name of an obligor in a replevin bond to be erased, it was held that no action could be sustained on the principal’s official bond.²

§ 468. To whom officers and their sureties on their official bonds are liable—Plaintiff must prove breach as to him.—In general a public officer is liable only to the person to whom the particular duty is owing, and whenever he is called to account, the first and ruling question is whether the plaintiff shows any breach of a particular duty to him. It is by no means sufficient to show negligence on the part of the officer, and an injury to the plaintiff; it must be shown also that such negligence and consequent injury constituted a breach of some duty which the officer owed to the plaintiff. Hence a mortgagee cannot maintain an action against a county trustee because the latter neglected or failed to collect the taxes due on the mortgaged premises from the personal estate of the mortgagor and thereby threw that charge upon the mortgaged property. It is true that it was the duty of the county trustee

¹ *Moore v. McClief*, 16 Ohio St. 50; *Duncan v. Drakely*, 10 Ohio, 47; *Bank, etc., v. Domigan*, 12 Ohio, 220; 40 Am. Dec. 475; *Webb v. Anspach*, 3 Ohio, St. 522; *Conklin v. Parker*, 10 Ohio St. 28; *Langdon v. Summers*, 10 Ohio St. 77. That an officer may successfully defend an action for not returning an execution by showing that the apparent default resulted from the act or instructions of the plaintiff is supported by the following cases: *Robertson v. Coker*, 11 Ala. 466; *Kennedy v. Smith*, 7 Yerg. 472; *Robinson v. Harrison*, 7 Humph. 489; *Granberry v. Crosby*, 7 Heisk. 579; *Shannon v. Clark*, 3 Dana, 152; *Norris v. State*, 22 Ala. 524.

² *Rogers v. The Marshal*, 1 Wall. (68 U. S.) 644, 654; *s. c.*, 4 Myers’ Fed. Dec., § 309, 310.

to collect the tax from the personality of the mortgagor, but that was not a duty which he owed to the mortgagee. It is true that the failure of the officer to discharge his duty in this respect caused an injury to the mortgagee, but that injury was indirect and remote, and was wholly unprovided for by the law. The law fixes the liability of the officer, and the law and the bond, that of the surety, not only in other respects, but also as to the persons to whom the duty or the penalty is due.¹ So a sheriff is liable only for his neglects in a pending suit to the plaintiff or defendant in that suit.² The law cannot in such cases look beyond the proximate mischief resulting to a vested right, and do more than redress that mischief at the suit of the person immediately wronged. So the publisher of the newspaper having the largest circulation, could not recover damages from the postmaster for denying to him the publication of the list of letters remaining uncalled for in the post-office, although it was the duty of the postmaster to give to the newspaper having the largest circulation, the job of publishing that list of letters.³ So an attorney is only responsible to the person with whom he contracts, for to him alone the attorney owes a particular duty.⁴ So a recorder who gives an erroneous certificate is liable only to the person to whom it is given;⁵ and contractors for public works are responsible only to their employers for want of skill and care in executing their contracts.⁶ And a railway company is not liable to an interloper for injuries resulting

¹ *State v. Harris*, 89 Ind. 363.

² *Harrington v. Ward*, 9 Mass. 251; *Camp v. Pruitt*, 88 Ind. 171; *Gardner v. Heartt*, 3 Denio, 232; *Bank of Rome v. Mott*, 17 Wend. 554.

³ *Strong v. Campbell*, 11 Barb. 135.

⁴ *Fish v. Kelly*, 17 C. B. (n. s.) 194; *Savings Bank v. Ward*, 100 U. S. 195; *Commonwealth v. Harmer*, 6 Phila. 90.

⁵ *Hensemian v. Girard, etc., Assn.*, 81 Penn. St. 252; *Wood v. Ruland*, 10 Mo. 143.

⁶ *Mayor, etc. v. Cunliff*, 2 N. Y. 165; *Pickard v. Smith*, 10 C. B. (n. s.) 470.

from negligence.¹ The rule in this matter is well stated in a New Jersey case: "But the law does not attempt to give full reparation to all parties injured by a wrong committed. If this were so, all parties holding contracts, if such exist, under the plaintiff and who may be injuriously affected by the conduct of the defendants would be entitled to a suit. It is only the proximate injury that the law endeavors to compensate; the more remote comes under the head of *damnum absque injuria*."²

¹ Lary *v.* Cleaveland, etc., Co., 78 Ind. 323; *s. c.*, 41 Am. R. 572; Everheart *v.* Terre Haute, etc., Co., 78 Ind. 292; *s. c.*, 41 Am. Rep. 567; Winterbottom *v.* Wright, 10 Mees. & Wels. 109.

² Dale *v.* Grant, 34 N. J. L. 142. See, also, Loop *v.* Lichfield, 42 N. Y. 351; *s. c.*, 1 Am. Rep. 543; Anthony *v.* Slaid, 11 Metc. (Mass.) 290. *Contra*, however, see Raynsford *v.* Phelps, 43 Mich 342.

CHAPTER XV.

ACTIONS ON OFFICIAL BONDS

SECTION 475. Remedies on official bonds in general—By whom and for whom actions may be brought.

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477. Rule as to jurisdiction in actions on official bonds.
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491. Same subject continued.
492. Same subject continued.
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SECTION 500. Liability of surety for acts of his principal's duly authorized agent.

501. What law forms part of contract embodied in an official bond.
502. The real plaintiff in an action on an official bond must not only establish a breach, but show his own interest.
503. When the laches of one officer is not a defense available for another.
504. Action on official bond cannot be maintained in favor of third persons for collateral grievance.
505. Action and judgment on conditional bond—When no bar to subsequent action.

§ 475. Remedies upon official bonds in general — By whom and for whom actions may be brought.—It is almost unnecessary to say that whenever a breach of an official bond is committed by its principal obligor, a cause of action accrues to the obligee, either on his own behalf or for the use of such other persons as the instrument is intended to protect. It has been repeatedly stated in the course of this work that many bonds of a strictly official character are executed by persons in places of public trust, prescribed by statute, and made payable to the "state," "people," or "commonwealth," or else to the governor, president, or other chief officer, which are designed not only to secure public interests, but to redress wrongs to individuals. Actions on such bonds must, of course, be brought in the name of the obligee, whether the object of the suit be to enforce the rights of the state, or to protect private interests. In the latter case, it is usual to bring the suit as by the obligee, "at the relation," or "for the use" of the real party in interest. It is, of course, necessary to success in an action of this character, not only that the cause of action be sustained by adequate proof of a breach of the bond, but it is also essential that the relator or other alleged beneficiary, shall make it appear that he has suffered such a wrong or injury as entitles him to the benefit of the official bond and an action upon it. It might well happen that an officer might be guilty of such official misconduct as

amounted to a breach of his bond, and yet that a wrong which he had done to a particular person was not so closely connected with his official duty, as to authorize any remedy on his bond. And he might also inflict serious injury upon individuals for which he could be held personally liable, and yet not commit a breach of his bond at all.

This chapter is devoted to the consideration of the various causes for which a plenary action can be sustained on an official bond, and those for which no such action can be maintained.

§ 476. When an action will lie on the bond of a ministerial officer. — When a party has a cause of action against a ministerial officer for a trespass, it is not necessary that he shall first pursue his remedy against the officer alone in an action of trespass, but he may at once have recourse to the official bond of the officer and sue him and his sureties. If a sheriff or constable seizes the property of one man for the debt of another, he is beyond doubt a trespasser, but he is also guilty of a breach of his official bond. “The bond is a contract by which the officer and his sureties in effect covenant and agree not only that the officer will faithfully perform the duties enjoined by law, but that he will not by virtue, or under color of his office, commit any illegal or improper act. The obligation imposed by the contract, and the liability resulting from a violation of its terms are, in all cases, primary and absolute, and the remedy is the same whether the cause of action result from the nonfeasance or the misfeasance of the officer.” It is *official* misconduct for a sheriff to seize, by virtue of process in his hands, the property of one person for the debt of another, a stranger to the writ, and for such seizure, he and his sureties on his official bond are liable.¹

¹ *Van Pelt v. Littler*, 14 Cal. 194, 196; *People v. Schuyler*, 4 N. Y. 173; *Ex parte Chester*, 5 Hill (N. Y.), 555; *Skinner v. Philips*, 4 Mass. 69; *Archer v. Noble*, 8 Me. (Greenl.) 418; *Forsyth v. Ellis*, 4 J. J. Marsh. 299; 20 Am. Dec. 218; *Commonwealth v. Stockton*, 5 Mon. 182; *Harris v. Hanson*, 11 Me. 241; *Carmack v. Commonwealth*, 5 Binney, 184.

§ 477. Rules as to jurisdiction in actions on official bonds. — In actions brought to enforce official bonds and other bonds with condition, there arise sometimes questions of jurisdiction, and also of the form of action to be used to enforce the liability of the parties. With regard to the first question, it may be said that it is the amount of the penalty stated in the bond, and not the damages laid in the declaration, that controls the question of jurisdiction.¹ As to the form of action, where the old forms are preserved, the rule is, in the absence of statutory provisions to the contrary, that a judgment in an action of debt merges the penalty in the judgment, and no other action can be brought on the bond, whereas successive actions of covenant may be maintained by different plaintiffs, or by the same plaintiff upon different and successively occurring causes of action.² In an action of covenant, the recovery is limited to the damages laid in the declaration, in debt it is for the full amount of the penalty to be discharged by the damages sustained by the breach of the condition.³ It is proper to remark in this connection, that it is usual when a bond is prescribed by statute, to authorize successive suits to be brought for the benefit of parties injured, until the aggregate of the sums recovered are equal to the amount of the penalty of the bond.

§ 478. Jurisdiction of actions on official bonds — What courts possess such jurisdiction. — Jurisdiction of a statutory or official bond is limited to the courts of the state by the legislation of which its execution is authorized. It will not be enforced as an official bond by the courts of any other state, or at least to give it legal validity, it must be predicated upon legal requirements in force *in loco contractus*. Without such basis, the instrument is void.

¹ Sims *v.* Harris,, 8 B. Monr. 55.

² Sims *v.* Harris, *supra*; Harrison *v.* Park, 1 J. J. Marsh. 174.

³ Harrison *v.* Park, *supra*; Bealler *v.* Schoals, 1 A. K. Marsh. 477.

Besides, the laws of a foreign sovereignty must be proved as facts, and in a suit upon a bond based upon such foreign law, the tenor of the law must be alleged in the declaration, and due proof made to sustain the allegation. Where any contract made in a foreign state is sought to be enforced, the *lex loci contractus* controls the construction of the contract, unless it relates to real estate situated within the jurisdiction of the court acting upon it, or unless the contract is made with a view to be performed within the state in which the matter is adjudicated. And in the construction and enforcement of such contracts, the rule is that the observance of foreign laws rests wholly on comity and convenience, and they will be disregarded if their observance will be inconvenient or tending to injustice. If foreign laws are irreconcilable with local laws, or conflict with established policy, they can form no foundation for the enforcement of any right, or the basis of any cause of action. Upon these considerations, it has been held that an action upon the official bond of a sheriff executed in New Hampshire, cannot be sustained in Vermont, being brought in the name of the obligee for the benefit of a person who was a stranger to the bond, and who at common-law could sustain no action on it, and that the statute of New Hampshire, "giving him a remedy, is a mere local regulation affecting the judicial proceedings of that state. It is not directory to us, nor can we consistently with established rules assume the duty of enforcing it." The court says, however, that "whenever a bond, although taken in pursuance of a statutory provision is left, as to its operation and effect, to be governed by common-law rules, there can be no obstacle to enforcing it anywhere, like any other instrument of the kind. What we decide is this: when an official bond is, by the law of the state where it is executed to have effect only in a particular way, and to be enforced only in a particular mode pointed out by those

laws, the enforcing it in that mode is the exclusive province of the tribunals of that state.”¹

And in Ohio, it has been held that a suit upon an official bond executed in Indiana, cannot be sustained in the former state, so as to charge the obligors in the bond with statutory penalties for misfeasance in office, the penalties being prescribed by the laws of Indiana. The court decides that the Indiana statute is penal in its character, and says: “The penal laws of one state can have no operation in another state, or be enforced by the courts of another. Penal laws are strictly local and affect nothing more than they can reach.”²

§ 479. Jurisdiction of courts over official bonds—Limitation of that jurisdiction by amount of penalty.—It is a general rule that in an action of debt on a bond conditioned for the payment of money, that judgment will be rendered for the penalty of the bond, to be discharged, however, by the payment of the amount found to be due. The same rule is applied to a bond, the condition of which is the discharge of official duties, and the amount of the actual recovery has been held to be the test of the jurisdiction of the court over the case. Thus, a judgment for the amount of the penalty of an official bond \$2,000, to be discharged by the payment of \$150 damages, rendered by a justice of the peace, was held valid, the amount of the damages being within the jurisdiction of the justice, although the amount of the judgment, \$2,000, was not. The court says: “The action is not upon the bond for a sum certain, nor is the bond for the payment of a liquidated amount, or a bond for the payment of money, as in § 824 of the Code; but the suit is brought to recover damages for an act in the

¹ *Pickering v. Fisk*, 6 Vt. 102.

² *Indiana use, etc., v. John*, 5 Ohio, 218; *Folliott v. Ogden*, 1 H. Blkst. 135; *Holman v. Johnson*, Cowp. 341; *Scoville v. Canfield*, 14 Johns. 338, 340; 7 Am. Dec. 467.

nature of a tort.”¹ There is a like ruling as to the jurisdiction of justices of the peace in Iowa. The penalty of the bond (not, however, an official bond) was \$300, which sum was above the jurisdiction of the justice, the amount claimed was \$100, which was within his jurisdiction, and the court held that the amount claimed was the criterion of jurisdiction, not the penalty of the bond.² And to the same effect is a New York ruling.³ In Illinois, a distinction is made between official bonds and other bonds upon condition, on the former, by statute, a justice has jurisdiction where the penalty exceeds one hundred dollars, on the latter he has no jurisdiction beyond that amount.⁴ On the contrary, in North Carolina, the supreme court decided in an action on an official bond, that the penalty of the bond is the *sum demanded*, and that jurisdiction is controlled by the amount of the demand, and not by the amount of damages prayed for or assessed, that the judgment is for the full amount of the penalty. A justice of the peace, therefore, cannot in that state render judgment upon an official bond, the penalty of which exceeds two hundred dollars, that being the limit of his jurisdiction.⁵

§ 480. Same subject continued. — In this matter a distinction is made in some of the states, under the old system of pleading, between the different forms of action. If the action is debt the criterion of jurisdiction is the amount of the penalty, the judgment being for that amount, with damages and costs, the provision that it may be discharged by the payment of the damages, being in the nature of a *remititur*; if the action, however, is cove-

¹ *State ex rel. v. Luckey*, 51 Miss. 528; *Harrison v. Park*, 1 J. J. Marsh. 174.

² *Stone v. Murphy*, 2 Iowa, 35.

³ *Boomer v. Laine*, 10 Wend. 525.

⁴ *Snowhook v. Dodge*, 28 Ill. 63.

⁵ *State ex rel. v. Porter*, 69 N. C. 140; *State ex rel. v. Rousseau*, 71 N. C. 194.

nant the judgment is for the damages only, which in that case forms the criterion of jurisdiction.¹ Upon the whole, the better opinion would seem to be that the criterion of the jurisdiction is not the nominal amount of the penalty, or the judgment rendered for it, but the damages prayed for and the actual judgment for which execution will be issued.

§ 481. Who may institute an action on an official bond — Statutory assignment — Party in interest cannot maintain such action in his own name. — Unless consent of the obligee in an official bond be given, no suit can be instituted upon it for the benefit of any other person. It is usual, however, for the same statute which prescribes the execution of the bond to regulate the use of it by and for persons who have an interest in its enforcement. In Maine, it is provided that when a suit has been instituted on an official bond, any person, other than the original plaintiff, who may have a cause of action arising out of the bond, may file an additional declaration in the cause and thereby become a co-plaintiff. The statute which authorizes this duplication of parties and causes of action does not, however, take away the right to institute more than one action on the bond.² And in some of the states there are statutory provisions requiring that suits shall be brought in the name of the real party in interest. Official bonds made payable to the state are regarded as exceptions to this rule and suits upon such bonds must be brought in the name of the state, although the beneficial interest in the bond is vested in private persons. Such was a decision in a North Carolina case, in which a clerk and his sureties were sued by a private person on their official bond payable to the state. The court sustained a demurrer to the complaint and dismissed

¹ Sims *v.* Harris, 8 B. Monr. 55; Wetherell *v.* Inhabitants, etc., 5 Blackf. 357.

² White *v.* Wilkins, 24 Me. 299.

the action. The usual practice, it is almost unnecessary to say, is to bring suit in the name of the state upon the relation, or for the use of, the beneficiary.¹

It may, however, be remarked that there are exceptional cases, and it is not always essential that a suit on an official bond should be brought by the obligee named in it. It sometimes happens that such a suit may be instituted not only without his consent but against his protest. Statutes are enacted in many of the states which require that bonds to secure the payment of costs shall be given by plaintiffs upon the institution of suits. In Arkansas such bonds are made payable to the defendant in the suit and are designed to protect not only him but officers of the court and witnesses in the cause. Such bonds may be put in suit by any person entitled to fees, and it is error to dismiss the suit upon the affidavit of the obligee that it was instituted without his authority or consent.²

§ 482. The same subject continued. — The general rule is, however, that it is necessary that the action be brought in the name of the obligee of the bond. A bond was given by a person who had been convicted of violating the anti-tippling laws, in which he bound himself to the commonwealth, “to the use of the town of Northampton,” that he would not within one year violate the law by repeating the offense of which he had been convicted. After a breach of that bond suit was brought upon it by the “inhabitants of Northampton,” and upon demurrer the court held that the action could not be maintained, because “the right of action on a sealed instrument belongs to the party having the legal interest,” which in that case was the commonwealth as obligee.³

¹ *Carmichael v. Moore*, 88 N. C. 39.

² *Boyd v. Crutchfield*, 7 Ark. 149.

³ *Inhabitants of Northampton v. Elwell*, 4 Gray, 81; *Sanders v. Filley*, 12 Pick. 554; *Johnson v. Foster*, 12 Metc. 167; *Millard v. Baldwin*, 3 Gray, 484. See, also, *Fuller v. Fullerton*, 14 Barb. 59; *Jansen v. Ostrander*, 1 Cow. 670; *Armine v. Spencer*, 4 Wend. 406; *Lawton v. Erwin*, 9 Wend. 233, 238; *Skel-ling v. Yends*, 12 Wend. 306.

And where a bond was made payable to three named persons described as "committee," etc., and their successors in office; it was held that the action was well brought in the name of three other persons, they being described as successors in office of the obligees, as committee. In this case, it may be remarked, the appointment of the "committee" of religious societies is authorized by the express terms of a statute, and such committee is to be regarded as a *quasi corporation*.¹

A county treasurer may maintain an action against his predecessor and his sureties on his official bond for the balance due the county, and the suit may, in Arkansas, be brought either in the name of the state as trustee of an express trust, or in that of the new treasurer himself, he being the real party in interest, and entitled to receive the money in his official capacity. And in such a suit the adjustment of his accounts by the county court is conclusive upon the old treasurer and his securities.²

§ 483. Statutory provision for action on official bond.— Although it is the general rule that actions on official bonds must be brought in the name of the obligee, it is, of course, competent for the legislature of a state to empower a different official from the obligee to bring the suit. Thus, in Arkansas, the auditor of public accounts was formerly authorized to bring suit for the use of the state on a sheriff's bond payable to the governor. It is necessary, however, that the interest of the state in the debt or thing demanded, and its right to claim the same shall appear by appropriate averments in the pleadings; otherwise, if the right of the state to sue does not appear in the declaration, it is bad on demurrer, in arrest of judgment, or on error. Since the revised statutes of that state went into operation, the auditor

¹ *Bagley v. Lewis*, 3 Day (Conn.), 450.

² *Hunnicut v. Kirkpatrick*, 89 Ark. 172; *Haynes v. Butler*, 30 Ark. 69; *Jones v. State use, etc.*, 14 Ark. 170.

is divested of his right to commence suit in his own name and official character for any demand claimed by the State.¹

484. Action by official obligee after his retirement from office is illegal. — When by statute an official bond is made payable to a governor, giving his individual name and adding his official designation, the bond is really payable to the office and not to the person who at the time is its incumbent. He has no personal right or interest in it, and consequently when it becomes necessary to bring suit upon the bond it is error to use the name (as plaintiff) of the person who was governor at the time the bond was executed, unless, indeed, he is still governor when the suit is brought. Thus where a suit was brought in the name of an ex-governor to whom it was made payable, a demurrer to the declaration was sustained.²

§ 485. The priority of the vigilant. — The priority of the vigilant is preserved in actions on official bonds as well as in other cases in which there is a race of diligence. It is an established principle that the person who first sues and obtains judgment on an official bond is entitled to take the whole of the penalty, if his demand amounts to so much in exclusion of every other claimant. The same rule applies as well to the bonds of sheriffs as to those of auctioneers or other persons exercising a privilege or performing the functions of an office, after having given a bond.³ Of course the rights of subsequent plaintiffs must not be impeded by fraudulent or collusive actions, but such cases, like other cases of fraud, must be dealt with as they arise.

¹ *Taylor v. The Auditor*, 2 Ark. 174, 194.

² *Bagby v. Baker*, 18 Ala. 653.

³ *Dallas v. Chalmer*, 3 Dallas, (3 U. S.) 501 (note); *Christman v. Commonwealth*, 17 Serg. & R. 381. See, also, *Lea v. Yard*, 4 Dall. (4 U. S.) 106 (note); *McKean v. Shannon*, 1 Binney 370.

§ 486. For whose benefit an official bond is made, whom it protects, and whom it does not protect — Who can, and who can not bring a suit upon it. — The law in requiring an official bond contemplates it as a security for those whose rights it commits in certain cases to the officer. For that purpose it is required, but persons who do not fall within that description are not entitled to the benefit or protection that it affords. Thus a defendant in an execution who voluntarily paid to the sheriff certain uncurrent money which the plaintiff refused to accept in satisfaction of the debt, could not recover from the sheriff's sureties the value of the uncurrent money, although the sheriff himself was liable for it. The reason given for this ruling is that defendants in executions do not constitute one of the classes of persons that the official bonds of sheriffs are intended by law to secure.¹ And even the state itself, although the principal beneficiary of a sheriff's bond, cannot hold the sureties liable in all cases in which the principal becomes responsible. An action cannot be maintained on a sheriff's official bond for money obtained by that officer from the state, upon false claims for feeding and otherwise caring for prisoners in the county jail. The court held that this illegal conduct on the part of the sheriff was neither within the terms of the bond, nor within the contemplation of the law which provided it.²

§ 487. A rule as to damages. — Although the state may maintain a civil action on a sheriff's official bond for official delinquency in criminal cases, yet unless some damage results from the breach of the bond, the action cannot be sustained. Thus, where a sheriff had taken informal and invalid recognizances from defendants in a criminal prosecution, for their appearance at court, and they did duly ap-

¹ *Brown v. Mosely*, 11 Smed. & Marsh. 354.

² *Furlong v. The State*, 58 Miss. 717.

pear, at two successive terms of the court, and afterwards escaped, the court having omitted to require them to renew their recognizances, it was held that the escape was the fault of the court and not of the sheriff, and that, therefore, he was not responsible on his official bond for damage which did not result from his fault.¹

§ 488. Rule when there are two bonds given by the officer. — When an officer is required by statute to give *two* bonds, one general, securing the due discharge of the general duties of the office; the other special, providing for certain specific and special functions; a party having cause to complain of a breach of the special bond cannot seek redress by an action on the general bond, and, *a fortiori*, persons damnified by a breach of the general bond could bring no action on the special bond, no breach of that instrument having been committed.²

§ 489. Same subject continued. — Not a few of the questions arising out of the official bonds of sheriffs are controlled by the principle that at common law as well as under the statutes of many of the states, the sheriff is authorized to complete after the expiration of his term of office the execution of final process which was begun by him during his term. An instance of the application of this rule is to be found in a case in which a deputy sheriff received and levied as such an execution, which he held until after he had himself become high sheriff and given bond as such, when he proceeded to sell the property and made the money. In doing so he was acting, not as sheriff, but as deputy sheriff, and the sureties on his bond as sheriff were not liable for his default in not paying over the money.³

¹ Commonwealth *v.* Reed, 3 Bush (Ky.), 516.

² State *v.* Felton, 59 Miss. 402; State *v.* Mayes, 54 Miss. 417.

³ People *v.* McHenry, 19 Wend. 482.

§ 490. Previous judgment against principal — When necessary to maintain an action — When not necessary. — It is not generally the rule that a judgment against the sheriff individually is an essential preliminary to an action on his official bond, but in South Carolina, under the statute of 1795, it was held not only that there must be a judgment against the sheriff, but a return of *nulla bona* as well, before an action against his sureties can be maintained on his official bond.¹ And in Maine an action on an officer's official bond must be preceded by a judgment against the officer himself, founded directly on his official delinquency, for that is the *gravamen* from which the action arises. The bond is given for security against the defaults and misdoings of the officer and not for a breach of his promises, and hence *assumpsit* is not the proper form of action against an officer for neglect or misbehavior in office.² And in case such an action is brought, it is not necessary that any notice be given to the sureties of the officer's default, or of the judgment against him, nor is it essential that the suit on the official bond shall be promptly instituted, for lapse of time after the rendition of the judgment against the officer will create no presumption of its payment. "No time short of twenty years can raise the legal presumption that the judgment has been satisfied." And the judgment rendered against the officer is *prima facie* evidence against the sureties in the action upon the bond.³

§ 491. Same subject continued. — On the other hand, in New Jersey a previous judgment against the sheriff is not necessary to the commencement of a suit on his official bond, the cause of action being a voluntary escape. The court puts its ruling on the ground that such a judgment

¹ *Commrs., etc., v. Neuby*, 1 *MvCord*, 184.

² *Bailey v. Butterfield*, 14 *Me.* 112.

³ *Cony v. Barrows*, 46 *Me.* 497; *Dane v. Gilmore*, 49 *Me.* 173; *Dane v. Gilmore*, 51 *Me.* 544.

against the officer could not be used for any purpose against his sureties. They would not be parties to such a suit—they could neither defend it nor take it up for review, and consequently, according to the well established principles of evidence, it could not be used to fix them with any liability.¹

And in New York, under the statute of 1827, it is a matter of judicial discretion whether the court will permit an action to be brought on the official bond of a sheriff without a previous recovery of a judgment against that officer. Before the enactment of that statute the recovery of such a judgment was a necessary preliminary to an action on the official bond; by that statute it was made sufficient to show by affidavit or otherwise, the inability of the sheriff to respond individually to damages that might be recovered against him.²

§ 492. Same subject continued.—And while a suit against a principal is not an essential prerequisite to an action on an official bond, it is equally true that a judgment against a principal, as for example a sheriff, for a trespass is not a bar to a subsequent action on his official bond for the same cause of action. The plaintiff had his election either to sue the officer alone for the trespass, or to join his sureties as defendants, and having first obtained judgment against the principal, he is not precluded from availing himself of the liability of the sureties. The judgment against the sheriff is merely an ascertainment of the damages, conclusive as to him, and *prima facie* evidence against his sureties.³ And upon the same principle that precludes the necessity of a prior action against the principal obligor, it may be said that if a deputy sheriff executes a bond to his

¹ *State v. Leeds*, 31 N. J. L. 185, 186; *Douglas v. Howland*, 24 Wend. 35; *McKellar v. Bowell*, 4 Hawks, 34, 43.

² *People v. Easton*, 2 Wend. 297, 299.

³ *Charles v. Haskins*, 11 Iowa, 329, 334.

principal, by which he becomes liable to account for money collected by him, and fails to pay over the money in due season, and in accordance with his duty and the terms of his bond, he and his sureties are liable to an action, and the principal officer may institute suit, although he himself has not been sued for the default of the deputy.¹

The better opinion is that in most of the states it is not necessary before suit shall be brought against a sheriff and his sureties, that the demand be first ascertained by a judgment against the sheriff himself. In Alabama and in most other states the statutes authorize a direct proceeding upon the bond in the first instance, for whatever is a technical breach of the sheriff's bond will support a judgment against all its obligors. There being no necessity for more than one suit to fix the liability of the defendants, only one should be instituted.²

§ 493. Action against a tax collector—When it can be sustained. —The rule on collectors of taxes in New York; is that as soon as a collector receives his warrant for the collection of taxes he becomes a debtor to the county for the amount of the taxes specified in the warrant. The burden is thereupon thrown upon him to show a discharge of that indebtedness and this he can do in one of two ways; either to produce the receipt of the proper officer to whom he has paid the amount collected; in this manner he can acquit himself of so much of the tax money as he has collected. For the uncollected balance he must make affidavit that upon diligent inquiry he had been unable to find any property belonging to the persons charged with such taxes. If he cannot relieve himself in this manner he is liable as a defaulter, and his sureties on his official bond are responsible for the deficit. This being the state of the law, it

¹ Colter v. Morgan, 12 B. Monr. 278.

² Governor v. White, 4 Stew. & Port. 441; 24 Am. Dec. 763.

was held that sureties cannot set up in defense that the warrant came into the hands of their principal so late that he did not have time under the statute to give the necessary notice and enforce the collection by law. This defense, the court said, was very reasonable, and would be sufficient if the parties setting it up had gone farther and shown the collector had not received the money at all. If the collector fails to acquit himself by showing either that he had received the money and paid it over, or that he had not received it, the conclusion is that he *has* received it and his sureties are liable for it.¹

§ 494. Loss or damage to plaintiff essential to the maintenance of action on bond. — The purpose for which officers are required to give bond and sureties for the due discharge of their official duties is to make the bond a security for any damage that may be sustained by reason of any breach of their official duty. No action can, therefore, be sustained, for no breach can be shown, unless there have been such damages sustained, as would give the party a right to maintain an action on the case. And to sustain an action on the case it must appear that the plaintiff has suffered damage, that the defendant has committed a tort, and the damage is the clear and necessary consequences of the tort. Upon these principles the neglect of clerks to give notice to guardians to renew their bonds did not make them liable to suit upon their bonds, because the damages would necessarily be uncertain and conjectural, and because a penalty for such neglect was provided by statute.²

§ 495. When an action can be brought upon an official bond on an equitable assignment of the cause of action. — In a proper case an equitable assignment of a demand growing out of a breach of an official bond will be

¹ *Fake v. Whipple*, 39 N. Y. 394, 398; *s. c.*, 39 Barb. 339.

² *Jones v. Biggs* 1 Jones (N. C.), 364.

created in favor of a person different from the one for whose use the action is instituted. Thus, a sheriff by legal process made the whole of the money due upon an execution in his hands, but paid over to the plaintiff only a part of it. A surety defendant, in ignorance of the fact that the sheriff had received the whole of the debt from his principal, paid to the plaintiff the balance due him. In an action on the sheriff's official bond it was held that the suit was properly brought in the name of the state at the instance of the execution plaintiff for the use of the execution surety defendant, and that the payment by the latter of the balance of the debt entitled him to be regarded as the equitable assignee of the execution plaintiff.¹

§ 496. When imperfect authority of principal will preclude an action on an official bond. — If the authority under which a tax collector is expected to act is imperfect, as where the warrant confers no power to commit or to distrain, neither the officer nor his sureties can be held liable upon it. If he cannot legally enforce payment, it is manifestly unreasonable to hold him liable for not collecting.²

§ 497. When a cause of action accrues on an official bond. — The construction of an official bond frequently controls the character of the remedy which may be available upon its breach. A deputy sheriff's bond to his principal conditioned that he will well and duly perform all the duties appertaining to his office during, etc., is not a mere bond of indemnity against actual loss, but there is a breach of the bond, and a cause of action accrues to the obligee, whenever the deputy sheriff fails to obey the mandate of the writ under which he acts by paying over the money which he has collected. The cause of action thus accruing at the time the deputy fails to discharge his covenanted

¹ *Merryman v. State*, 5 Gill & J. 423.

² *Frankfort v. White*, 41 Me. 537.

duty, it follows that from the same period the statute of limitations begins to run in favor of the obligors in the bond, and not from the time that the sheriff had suffered the actual loss or damage consequent upon the breach of the covenant.¹ It need hardly be said, however, that all rulings in this connection must necessarily depend in many respects upon the language of the bond, and the intention of the parties as legitimately deduced from that language. If the language of the bond, being sufficiently in accord with the tenor and effect of the statute by which it is authorized, unmistakably indicates that its obligors contemplated only ultimate liability, the bond must receive that construction. The general rule is, however, as above stated, that where the guaranty is for the due performance of duty, the breach occurs, and the cause of action accrues, whenever that duty is *not* duly performed.

§ 498. Limitation of liability of sureties on a subordinate officer's bond. — A sheriff, however, cannot have a cause of action on his deputy's official bond unless there is not only a technical breach of duty on the part of the deputy, but such a breach as occasions pecuniary damage to the sheriff, or subjects him to a legal liability. The object of the bond is to indemnify the sheriff against such damage. And the liability of the deputy's sureties is limited to his official acts as a general deputy. They are not responsible for his courtesy to his superior officer, or for troublesome and annoying conduct, if he keeps within the line of duty as a public officer.²

§ 499. When action cannot be sustained on official bond by reason of subsequently enacted law. — The sureties on the official bond of an officer are not bound for

¹ *Badgett v. Martin*, 12 Ark. 730; *Chase v. Hinman*, 8 Wend. 452.

² *Rowe v. Richardson*, 5 Barb. 385, 390; *Hughes v. Smith*, 5 Johns. 168; *Tuttle v. Cook*, 15 Wend. 274; *Cook v. Palmer*, 6 Barn. & Cr. 739.

money received by their principal which he was not authorized at that time, by the law then in force, to receive officially, although by statute, afterwards enacted, it became his duty to receive and account for money paid to him under like circumstances. A register in chancery acting *pro hac vice* as probate judge received money, the proceeds of a sale of property for division among distributees. The law at that time did not authorize the payment of such money to the probate judge nor to the register in chancery. Afterwards, by statute, the probate judge was required to receive such money, but it was held that the statute was not retroactive, and manifestly could not charge the sureties of a different officer, whose receipt of the money was, under the circumstances, personal and extra-official. The well established rule in such cases is that "for acts not within the line of official duty and authority, not under color of office, he may incur personal, not official, responsibility; and in that personal responsibility the sureties on his official bond are not involved."¹

§ 500. Liability of surety for acts of his principal's duly authorized agents.—Whether a payment made to the agent or servant of a creditor or person entitled to receive the money binds the creditor, or charges the fiduciary, depends upon the scope of the authority and functions of the servant or agent. If one pays money to the porter or other menial servant of a bank, the institution is not charged, of course, for the receipt of money is no part of the duty of such a person; if, however, it is paid to a teller, cashier, or other like functionary the bank is bound. Upon this principal the payment of money to the agent of a receiver of public money, who was left in charge of the receiver's office

¹ *McKee v. Griffin*, 66 Ala. 211; *Coleman v. Ormond*, 60 Ala. 328; *Brewer v. King*, 63 Ala. 511; *Morrow v. Wood*, 56 Ala. 1; *Kelley v. Moore*, 51 Ala. 364; *Moore v. Madison County*, 38 Ala., 670; *McElhaney, v. Gilleland*, 30 Ala. 183; *Drake v. Webb*, 68 Ala. 596.

during his absence with access to his official papers and blanks, and authorized to act for him, was held a payment to the receiver and charged his sureties.¹

§ 501. What law forms part of the contract embodied in an official bond. — This subject is fully considered elsewhere. There is, however, a recent ruling on the subject in Virginia which is worthy of special mention in connection with actions on official bonds. It is there held that when by statute, enacted after the execution of an official bond, extensions of payment are granted to the principal obligor in the bond, the sureties on the bond are nevertheless liable, because statutes of that character are merely directory, and directory statutes form no part of the contract incorporated in the bond. Hence it was decided that when the period of accounting and payment of a collector of taxes was postponed by joint resolution, an action might, nevertheless, be sustained against the sureties on the bond.²

§ 502. The real plaintiff in an action on an official bond must not only establish a breach, but show his own interest. — In a Maryland case, the usual practice in actions upon official bonds is stated with precision and accuracy. In that state, and in almost all others, the suit is brought in the name of the state or other official obligee "for the use" or "upon the relation" of the person who promotes the litigation and hopes to enjoy the fruits of it. He is, of course, the real plaintiff, and it is incumbent upon him to show his interest before he can recover in a regular trial prosecuted to verdict.³

¹ *Potter v. United States*, 107 U. S. 126.

² *Commonwealth v. Holmes*, 25 Gratt., 771; citing, *United States v. Kirkpatrick*, 9 Wheat. (22 U. S.) 720; *United States v. Vanzandt*, 11 Wheat. (24 U. S.) 184; *United States v. Nichol*, 12 Wheat. (25 U. S.) 509; *United States v. Boyd*, 15 Pet. (40 U. S.) 187, 208; *State v. Carleton*, 1 Gill. 249.

³ *Ing v. State*, 8 Md. 287.

§ 503. When the laches of one officer is not a defense available for another. — In an action against a collector of taxes and his sureties, it is not competent for him or them to deny the legality of the assessment upon which the tax list was issued, as for example, that it was duly signed by the assessors. It is the duty of such officers to obey warrants issued in due form, from a competent tribunal, and such the assessors must be deemed, although they may have failed to discharge their duty in every particular. The presumption is always that officers have done their duty, and their conduct cannot be collaterally assailed by subordinates whose duty it is to obey them.¹

§ 504. Action on official bond cannot be maintained for collateral grievance in favor of third persons. — The primary object of an official bond, is, of course, to protect the interests of the beneficiary named in it, the state, county, corporation etc., as the case may be. By statute, however, it is usually provided that bonds given by officers to states and counties shall be available to protect the interests of private persons who may be aggrieved by the breach of such bonds. They cannot be used, however, for these purposes in cases unprovided for by such statutory enactment. Thus a suit could not be sustained against the clerk of the county court on his official bonds, for alleged damage to the plaintiffs, in consequence of his refusing to receive in payment of their license as merchants, banknotes of a certain description, and his exacting under threats of legal compulsion, current money for such dues. The court says: "The bond is given to the state; is intended to enforce the performance of official duties, and to indemnify the public against official delinquency. Such is the plain meaning of its terms, and from the nature of the

¹ *Kellar v. Savage*, 20 Me. 199; *Inhabitants of Orono v. Wedgewood*, 44 Me. 49.

case, unless otherwise directed by statute would be its object. It certainly was not intended to be operative in favor of individual citizens for any wrong done to them by the officer.”¹

In this case it will be observed that the *gravamen* of the charge against the clerk was, that he had *overdone* his duty in requiring of the plaintiffs payment in a better currency than that which they tendered; where, however, the breach of the bond assigned, is a neglect of the duty prescribed by law, a very different question is presented. In a Texas case the failure of a clerk to record a deed was held to give, upon general principles of law, a right of action to any third person injured thereby, independent of statute; but the court does *not* say that such action can be brought upon the official bond. In that state, however, an action against the clerk on his official bond *is* given by statute to any person injured by a breach of the same.² And under the statute of Louisiana, an action may be brought on the official bond of the recorder for damages consequent upon his failure to record a mortgage.³

§ 505. Action and judgment on conditional bond when no bar to subsequent action. — Although when a judgment is had for the penalty of a bond, on account of one or more breaches, it may be permitted to stand as a security for subsequent breaches which may be recovered by *scire facias* thereon, the creditor is not precluded by that judgment from a suit and recovery upon the bond for a breach thereof, which occurred subsequently to the first named judgment. Such was the ruling of the Court of Appeals in Maryland, in a case in which a bond was given with a penalty to secure payment of a debt in five annual installments.

¹ *State v. Nichol*, 8 Heisk. (72 Tenn.) 657.

² *Pasch. Dig.*, Arts. 500, 1240; *Crews v. Taylor*, 56 Tex. 461.

³ *Fox v. Thebault*, 83 La. Ann. 32.

A judgment for the penalty was rendered after the maturity of the fourth installment and a failure to pay the same, and before the maturity of the fifth. An action having been brought on the bond on account of the fifth installment, it was held that a judgment was properly rendered for the penalty, to be discharged by the payment of the fifth installment, interest, and costs.¹

¹ *Ahl v. Ahl*, 60 Md. 207, 208.

CHAPTER XVI.

SUMMARY REMEDIES ON OFFICIAL BONDS—JUDGMENT BY MOTION, ETC.

SECTION 515. Summary proceedings on official bonds — In general:

- 516. What is necessary to a judgment by rule or motion — Essential elements of pleading to be retained.
- 517. Constitutional questions involved in judgments by motion.
- 518. What is the foundation for a motion for judgment on an official bond — What is matter of inducement.
- 519. To whom notice of a motion for a judgment on an official bond must be given.
- 520. Remedy by motion on joint and several official bond — Rights of plaintiff in the matter of procedure.
- 521. Rule in Tennessee as to judgment against only a part of the obligors of an official bond.
- 522. Against whom summary proceedings may be taken and judgments rendered on official bonds.
- 523. The principles which control summary proceedings on official bonds.
- 524. Upon what character of official bonds summary judgments may be rendered.

§ 515. Summary proceedings on official bonds — In general. — It is well known that to obtain redress of a grievance, or to enforce a legal obligation, it is not in every case necessary to resort to a regular and plenary action at law or bill in equity. Both by the common law and by statute, chiefly, however, by the latter, summary proceedings are authorized by means of which the forms of the law are greatly curtailed, and the ends of justice attained with much less delay than that incident to the ordinary practice of the courts. These proceedings are usually by rule or motion, the latter word being the more modern and, in the United States, far more usual than the former. The procedure, it

is hardly necessary to say is simple. Under certain circumstances, and in a proper case, a person becomes entitled by law to a judgment against another; after giving the prescribed notice to the defendant, he applies by motion to the court for a judgment and if he supports his demand by appropriate and adequate evidence he obtains it. Of course all these statutory expedients for abbreviating the ordinary course of legal procedure, and accelerating the deliberate steps of justice are in derogation of common law and, as a rule, the statutes which prescribe them must be strictly construed.

Among others the obligors of official bonds are in some of the states subjected to the operation of these speedy and summary proceedings, and that fact renders it necessary to consider the subject in this work.

§ 516. What is necessary to a judgment by rule or motion — Essential elements of pleading to be retained.—The officers most usually subjected to proceedings by rule or motion are executive officers, such as sheriffs, constables, marshals and the like, though similar remedies are provided in many statutes for the defaults of clerks of courts; treasurers, and others having the custody of money, public or private. In England the “rule” against the sheriff has always been an ordinary form of procedure, and its counterpart, either under that name or the name of motion, is to be found in most of the American states. In all proceedings under statutes authorizing summary judgments against offending officers and their sureties, it is necessary that a proper notice shall be given and that in such notice the essentials of pleading shall be preserved, for the notice stands in the stead of the declaration, and must so describe the cause of action that the defendant can know what is the grievance laid to his charge, or what is the demand to which he is called upon to respond. The object of this class of statutes is not to affect rights, but to save time and expense, simplify

pleadings, and abbreviate proceedings. As already stated they will be strictly construed, but unless they conflict with the constitution of the state in which they are enacted, by infringing some right guaranteed by the constitution they are unobjectionable.¹

§ 517. Constitutional questions involved in judgments by motion. — There are two constitutional questions involved in summary judgments upon motion, both, however,

soluble upon the same principle. One is whether or not a judgment rendered in such a manner infringes the constitutional right to a trial by jury; the other is whether a provision in the statute authorizing such proceedings and judgments, and dispensing with notice, equivalent to process, served upon the surety, is not inhibited by the constitutions of the states in which the practice is permitted, as well as in derogation of common right. Both of these questions were very thoroughly considered in a Mississippi case, and on the first point the court held that the proceeding did not infringe the bill of rights which declared that "the right of trial by jury shall remain inviolate," because that right did not extend to questions, in the trial of which a jury is not necessary by the ancient principles of the common law, and because a sheriff is an officer of the courts, which have at all times the right to punish their own officers "for contempts in not obeying their process and orders, or for abuses in the administration or execution of justice by summary conviction." "This right," the court adds, "is as ancient as the law itself."² The court, therefore, concludes that the statute then in question, "merely regulates the mode of the exercise of powers inherent in the court, of punishing its own officers for a contempt, and makes that power auxiliary to the just rights of the party who has been injured."

¹ *Dawson v. Shaver*, 1 Blackfd. (Ind.) 204; *Hasbroys v. Hastings*, 1 Salk. 212.

² Citing, 4 Blackst. Comm. 283.

Upon a rehearing the court adheres to its opinion, holding further that the sureties were liable because, "by voluntarily making themselves parties with the sheriff, in all proceedings against him as sheriff, they submitted themselves to the jurisdiction of the court as it then existed by law, and virtually relinquished all claim to the ordinary process of law. * * * They are as much bound to submit to the remedy as to the liability. * * * It is upon this principle that an award of arbitrators is binding, when voluntarily solicited, or that a sale of property under a mortgage is a valid transfer. Hence, the courts render judgment on motion against all the obligors in a forthcoming bond. And it is upon the same principle that this court, and other appellate tribunals render final judgments against the sureties in appeal and writ of error bonds."¹ The court in this case has doubtless arrived at the correct conclusion, but has not placed the ruling sufficiently upon the proper principle. It is unquestionable that the law in force at the time any contract is made, which is applicable to that contract, enters into and forms a part of it, as fully as if it were all recited in the instrument in which the contract is embodied. And therefore if the law which is in force when an obligor signs an official bond, authorizes a summary judgment on that bond, with or without service of process or other actual notice, he is liable to the operation of the law, which he has in effect subscribed when he executed his bond.

§ 518. What is the foundation of a motion for judgment on an official bond — What is matter of inducement. — In summary proceedings on an official bond under

¹ *Lewis v. Garrett*, 5 How. (Miss.) 484, 453, 455; *Wells v. Caldwell*, 1 A. K. Marsh. 441; *Harrison v. Chiles*, 3 Litt. 202; *Bank of Columbia v. Oakley*, 4 Wheat. (17 U. S.) 285; *Burke v. Levy*, 1 Rand. (Va.) 2; *Van Zandt v. Waddell*, 2 Yerg. 260, 265; *Tipton v. Harris, Peck* (Tenn.), 414, 419; *McWhorter v. Marrs*, 1 Stew. (Ala.) 63; *Johnston v. Atwood*, 2 Stew. (Ala.) 225.

a statute, the *gravamen* of the charge, and the foundation of the action is the default or misfeasance of the officer, and not the bond itself which is a matter of inducement. It is so far essential, however, that the motion cannot be sustained unless the bond is valid, for the liability of the parties against whom the proceeding is instituted, depends upon the validity of the bond as much as if the bond itself were the foundation of the motion. “For assuredly if the sheriff and his sureties could not be made liable in an action on the bond, by reason of its invalidity, they could not be held liable in this summary mode of proceeding, if the bond were void.”¹

§ 519. To whom notice of a motion for judgment on an official bond must be given. — Of course, it is a general rule, that due notice must be given to all persons who will be affected by a judgment or legal proceeding, of the inauguration, pendency, and design of that proceeding. As judgments by motion are in all cases to be strictly construed, it would seem that the rule would be especially applied to such proceedings; but, nevertheless, it is provided in the statutes of some of the states, that notice of a motion for judgment against a sheriff and his sureties on his official bond, if served upon the sheriff and not upon his sureties, will warrant a judgment against them, as well as against him. Such legislation is legitimate, as this provision of the statute being in force when the bond is signed, forms in common with other law, germane to the matter, a part of the surety’s contract. In such cases, however, if the sureties do not appear, it is in incumbent upon the plaintiff to prove the fact of the suretyship, and make the evidence of that fact a part of the record. If they do appear to the action, the suretyship will be presumed against them unless they deny it by an appropriate plea.²

¹ Paddleford *v.* Moore, 32 Miss. 622.

² Reid *v.* Planters’, etc., Bank, 3 Ala. 712; Harris *v.* Bradford, 4 Ala. 214

In Mississippi the law required that the notice of a motion of this character shall be given to the sureties as well as the principal, and in such case the notice is to be regarded as in the nature of process. If they appeared and defended the suit by general plea, they were concluded as to the fact of the suretyship, and if they desired to deny their liability as sureties, they must crave oyer of the bond, and plead *non est factum*.¹

§ 520. Remedy by motion on joint and several official bond — Rights of plaintiff in the matter of procedure. —

A proceeding under a statute authorizing a summary judgment on official bonds is, in effect, an action at law, for it is “a legal demand of a man’s right.”² Having been given by statute, and not being in contravention of the constitution, the proceeding, as an action at law, is governed by the rules which control other actions. Among others, the plaintiff is entitled to the same rights as to dismissing his action as to one, and retaining and prosecuting it as to others of the defendants, if their liability is several. He may enter a motion against the sheriff and all his sureties, on a joint and several bond, and dismiss as to as many of the sureties as may suit his convenience.³

It may be remarked that by the statute of 1836, the remedy on sheriff’s bonds was made joint and several as upon other bonds and promises. And by that statute, also, it was provided that in suits and actions on such bonds against a surety only, the liability of the sheriff should be first fixed, except when he has died, or removed, or is not found.⁴

§ 521. Rule in Tennessee as to judgment against only a part of the obligors of an official bond. — In Tennessee, how-

¹ *Hamblin v. Foster*, 4 Smed. & M. 139, 150; *Lewis v. Garrett*, 5 How. (Miss.) 434.

² *Coke Litt.* 285.

³ *McCrosky v. Riggs*, 12 Smed. & M. 712.

⁴ *How & Hutch.* 299, § 33; *Code of Mississippi (1880)*, § 325.

ever, in a somewhat older case, judgment by motion against a sheriff and four out of five sureties on his official bond was held void because the fifth surety escaped scot-free. The ruling was put upon the ground that "a judgment on motion being in derogation of common law must be taken strictly — as a consequence of this rule, it has always been held that a statute giving a remedy by motion has no latitude of construction. The statute gives judgment on motion against a sheriff and his securities. If the judgment be taken against less than the number of the securities, are the terms of the statute complied with? Is it against his securities? Surely not. A judgment is given by motion against two; upon what principle shall you have it against one? If it be done, it must be by construction, and that a very dangerous construction."¹ In a later case, this ruling is followed, the court saying: "In a summary proceeding of this kind the statute must be strictly followed. It is a proceeding in derogation of the common law, and can only be valid where it pursues the precise requirements of the law under which the proceeding is had."² And it is said that a *nol. pros.* as to one of the sureties is fatal to the entire motion.³ But where the name of one of the sureties is omitted by mistake in the judgment rendered against all the others, as well as the principal, the judgment was good.⁴ If, however, one of the sureties is dead, a motion will lie against the principal and surviving sureties;⁵ the rule is otherwise, however, if it is the principal who is dead and not the surety.⁶

This line of decision would seem to operate a judicial

¹ Rice *v.* Kirkman, 3 Humph. 415.

² Fay *v.* Britton, 2 Heisk. (Tenn.) 606.

³ Chairman *v.* Sawyers, 1 Thompson's Cases, 55, cited in Thompson & Steger's, Code of Tennessee of 1870.

⁴ Jones, Gov., *v.* Henderson, 1 Thompson's Cases, 53, cited as above.

⁵ Rice *v.* Kirkman, 3 Humph. 418; Houston *v.* Dougherty, 4 Humph. 505; Hearn *v.* Erwin, 3 Coldw. 399, 401.

⁶ Gibson *v.* Martin, 7 Humph. 127.

repeal of the act of 1789,¹ Ch. 57, § 5, by which it was enacted that all joint obligations shall be joint and several. The statute giving the summary remedy, however, transforms, *quoad* the judgment by motion, the joint and several obligation of the principal and sureties into a *joint* obligation. Its words are “— against the person in default and such other persons made liable with him as may be in existence at the time of the motion.”²

§ 522. Against whom summary proceedings may be taken and judgments rendered on official bonds. — It depends, of course, upon the statutes of the states respectively, as to the official persons and their sureties against whom summary proceedings may be instituted, and judgments rendered on official bonds. In Tennessee, the summary remedy is given against sheriffs, coroners, constables, clerks, special commissioners, county trustees, tax assessors, tax collectors, and other like officers and their respective sureties.³ In Arkansas similar proceedings are authorized by statute,⁴ in Virginia a summary remedy is provided against sheriffs, sergeants, coroners, collectors, their deputies, and sureties on their respective official bonds,⁵ and under certain circumstances set forth in the statute against constables and their sureties.⁶ In Alabama, the statute provides for summary judgments in proper cases against sheriffs, coroners, and other executive officers; against clerks of courts, registers, and prosecuting officers; against judges of probate, tax collectors, tax assessors, treasurers, and other persons receiving money for the county, and against defaulters of public school money. In all cases, the motion

¹ Th. & St. Code of Tenn., § 2789.

² Thompson & St. Code Tenn. (1870,) § 3583.

³ Thompson & St. Code (1870), Ch. 14, *passim*.

⁴ Arkansas Digest of 1874, § 3644 *et seq.*

⁵ Code of Virginia, Ch. 49, §§ 45, 46, 47, 48, p. 479.

⁶ Code of Virginia, (1873), Ch. 147, § 12, p. 1006.

must be made against the party in default, and the sureties on his official bond, and judgment will be rendered against such of the parties, whether principal or surety, as have received notice of the intended motion.¹ Under this statute it was held that as to the parties who had received notice of the motion the proceeding was joint only, and not joint and several, and, therefore, the rules which apply to a joint action are applicable to it. A confession of judgment by the principal will not authorize a final judgment against his sureties, nor even, in a joint action, against himself.² It will be observed that in this case, the proceeding was joint, as to all the parties served with notice, in a later case, it is held that under the statute of the state, the notice need not include all the obligors in the bond, but a judgment may be rendered if the notice is given to one or more of them.³ The effect of the two decisions is, that the bond is a joint and several bond, but the summary judgment rendered upon it, is joint only as to all the defendants served with notice.

§ 523. The principles which control summary proceedings on official bonds. — It has already been stated that a statute which authorizes the rendition of a judgment by summary proceeding is in derogation of common law and must be strictly construed. This principle has in all the cases in which it is applicable, been strenuously insisted upon by the courts. The creditor who, instead of resorting to a plenary action on the officer's bond, chooses to avail him of the speedier remedy provided by the statute, is held as rigidly to its terms, as was Shylock to the terms of *his* bond by that strict constructionist, Portia — the pound of flesh — no more — no less. Besides this strictness of construction, the summary proceeding under a statute must

¹ Code of Alabama (1876), Title 2, Ch. 3, p. 763.

² Armstrong v. Halley, 29 Ala. 305.

³ Marion County v. Brown, 43 Ala. 112.

comprise all the essentials of a regular action at law, the notice must serve all the purposes of process and pleading; apprise the defendant of the time when, and the place where, he is expected to appear, to whom he is to make answer, and what is laid to his charge. The proceeding is, as it should be, in effect, an action at law. It varies, however, in one very essential particular from an ordinary action—there is usually no trial by jury, and unless the right to such a trial is waived, either expressly, or by fair construction of the statute, or the contract entered into under it, the defect would be fatal to the constitutionality of the statute, and the validity of the judgment. The execution of a bond, the enforcement of which by summary proceeding is authorized by existing law, is in effect a waiver of the right to a trial by jury. The law forms a part of the contract, and by executing the latter, the obligor binds himself to submit to the former.

§ 524. Upon what character of official bonds a summary judgment may be rendered. — Besides the bonds of executive and ministerial officers, of treasurers, clerks, county trustees, there are other bonds upon which summary judgments are habitually rendered by courts having jurisdiction of them. Bonds executed in the course of judicial proceedings and by order of a court, or in due course of law, are of this character. Appeal bonds, bonds for writ of error and *supersedeas*, and other less regular instruments which form a portion of the machinery of a lawsuit, are usually acted upon by the courts which have jurisdiction of them, without the ceremonial and the delay of a plenary action, and without the intervention of a jury. And in the case of these bonds, as of those already mentioned, the power to render the judgment is based upon the law, and the fact that the obligors knew when they executed the bonds, that if enforced at all, they would be enforced by summary judgment, and agreed that they should be so enforced.

CHAPTER XVII.

PLEADINGS IN ACTIONS ON OFFICIAL BONDS.

SECTION 530. Rules as to pleadings on bonds upon condition, and other specialties.

531. Mode of declaring upon a bond upon condition.
532. When error in pleading in an action on an official bond is harmless.
533. When and where an allegation that an officer did the act complained of *colore officii*, will not sustain an action on an official bond.
534. Pleading — What is necessary to allege in action on official bond.
535. Same subject continued.
536. Same subject continued.
537. Same subject continued.
538. Declaration must lay foundation for proof.
539. Rule that refusal to pay penalty upon demand must be averred does not apply to official bonds.
540. Declaration must show breach and exclude every other conclusion.
541. Same subject continued.
542. Averments necessary to charge marshal for taking insufficient surety on bond.
543. A variance that is amendable.
544. When unnecessary to indicate in a declaration on an official bond, who is the beneficiary in the action.
545. What is necessary to allege to charge sureties of an officer with liability for a trespass.
546. Damages on official bond may be laid in excess of penalty.
547. Declaration need not negative matters that would be no defense to the action.
548. Allegations which are irrelevant or absurd may be disregarded as surplusage.
549. A rule as to the recital of the interests of the beneficiaries of an action on an official bond.
550. Matters of evidence not to be set out in declaration.
551. What is not a sufficient statement in a declaration, of a breach of an officer's bond.
552. What is a sufficient assignment in a declaration, of a breach of an official bond.

- SECTION 553. Parties — Plaintiffs in an action on an official bond must have like interests, legal or equitable.
554. Plaintiff in an action on an official bond must assign no breaches that do not concern him.
555. What is necessary to allege as to breach of condition of an official bond.
556. Same subject continued.
557. What is an insufficient allegation of a breach of an official bond.
558. Same subject continued.
559. Same subject continued.
560. Pleading — Profert — When dispensed with — Rule when there are several breaches, some good and some bad.
561. What it is necessary to set out in a declaration on an official bond.
562. Same subject continued.
563. Same subject continued.
564. Same subject continued.
565. Same subject continued.
566. What is too general an assignment of a breach.
567. Pleading — Defense — Presumption — Defective declaration.
568. Same subject continued.
569. Effect of a sufficient plea — What is such a plea.
570. Answer or plea must exclude the conclusion set up in the declaration.
571. What defendants cannot deny by plea.
572. Parties — Effect of death of plaintiff upon the pleas available for defendants.
573. Provisoes and exceptions — Matters of defense must appear by plea.
574. What is an insufficient plea to an action for failing to return process.
575. Defect in declaration that can only be met by special demurrer.
576. A plea that plaintiff has not been damnified.
577. What is not a good plea to an action on a deputy's bond.
578. *Nil debet*, when not a good plea — Effect of joining issue upon it.
579. What is not a good replication to a plea of former recovery.
580. Further and miscellaneous rulings on pleadings on official bonds.
581. Same subject continued.
582. Same subject continued.
583. Estoppel of obligors in official bonds.

§ 530. Rules as to pleadings on bonds upon condition, and other specialities. — It is almost superfluous to say that in the common-law system of pleading all actions upon sealed instruments were either in debt or in covenant. In both the instrument was described in the declaration. In the first form of action, the demand was for the sum set forth in the instrument, the non-payment of that sum was alleged, and damages consequent upon the non-payment were also demanded. In the latter the covenants of the obligors were recited in the declaration, the breach of those covenants were assigned, and damages for the non-performance were demanded. In the former case the damages were auxiliary to the principal recovery, in the latter they constituted the recovery itself, costs, of course being awarded in either case.

The usual form of action on a bond with condition, whether ordinary or official, was debt, and the judgment of the court if the plaintiff prospered in his action, was for the amount of the penalty, that being the sum which the obligors bound themselves to pay, but to be discharged by the payment of the damages assessed by the jury and awarded by the court. The damages, therefore, constitute practically the whole recovery. In an action of covenant, as already stated, there is no recovery of the debt but only of damages and costs.

Although the general adoption of systems of code pleading in the several states has in a great measure superseded the common-law forms, it is well to bear in mind the peculiarities appertaining to the old forms, as a consideration of them will often lead to a solution of the questions growing out of the new. Indeed, the essentials of pleading under the old system are preserved in the new, excrescences and anachronisms have been lopped off, many futile forms and fictions have been dispensed with, but in the main the substance of pleading is the same in the new as in the old form of procedure.

§ 531. Mode of declaring upon a bond upon condition.—In declaring upon a conditional bond, there are two modes in use; one is by declaring upon it a single bond, disregarding the condition; in this case the defendant must crave oyer of the condition and plead performance, to which the plaintiff replies by assigning breaches. The other mode is to set out the condition in the declaration and assign the breaches, in which case the issue is made by the plea traversing the breaches and not by the rejoinder, as in the former mode.¹ In either case the form of action is debt, and the plaintiff must demand the penalty of the bond and allege its non-payment as in all other actions of debt.²

That such is the rule in all the states in which the old forms of pleading are retained is sufficiently obvious, and it is equally apparent that where a code system of pleading has been substituted the same practice is substantially preserved. Every where, the plaintiff in his declaration or complaint sets forth his cause of action and demands the reparation to which it shows him to be entitled; every where, the defendant by answer, plea, or demurrer seeks to show that his adversary is not entitled to the redress he claims. In case of a bond the technical redress is the amount of the penalty, and at common law and under the old practice the judgment, if for the plaintiff, is for the penalty, to be discharged, however, by payment of the assessed damages.

This is the general law as to bonds upon condition. The demand must be for the penalty, the plaintiff cannot “demand the penalty of the bond, and aver the non-payment of

¹ *Reynolds v. Hurst*, 18 W. Va. 648; *Allison v. Bank*, 6 Rand. 227; *Wood v. Fairfax*, 4 Munf. 494; *Nadenbush v. Lane*, 4 Rand. 418; *Green v. Bailey*, 5 Munf. 246.

² *Braxton v. Lipscomb*, 2 Munf. 282; *Green v. Dulany*, 2 Munf. 580; *Norvell v. Hudgens*, 4 Munf. 496; *Hill v. Harvey*, 2 Munf. 525; *Buckner v. Mitchell*, 2 Munf. 836; *Nicholson v. Dixon*, 5 Munf. 198; *Cobbs v. Fountain*, 3 Rand. 484; *Strange v. Floyd*, 9 Gratt. 474; *Douglas v. Central, etc.*, Co. 12 W. Va. 502.

some other sum. He cannot sue for the sum actually due and aver non-payment of the penalty.¹

§ 532. When error in pleading in an action on an official bond is harmless. — Of course, it is the rule in actions on official bonds, as in other suits at law, that the principles of pleading shall be duly observed. If, however, the error in the pleading is productive of no evil consequence to the other party, it will not authorize a reversal of the judgment by an appellate court. Thus, where in an action on an administrator's bond, an assignment of a breach was held good upon demurrer in the trial court, and upon appeal the court decided that although the demurrer should have been sustained in the court below, nevertheless, as no damages had been awarded by reason of that assignment of a breach, the error was harmless and would not authorize the court to reverse the judgment and remand the cause.²

§ 533. When and where an allegation that an officer did the act complained of colore officii will not sustain an action on an official bond. — In Wisconsin the law is that the sureties of an officer are liable for his acts done *virtute officii*, but not for those done only under color of his office. The pleadings in that state must conform to this rule. Hence an allegation that the principal obligor in an official bond being a marshal, and “*claiming*” to have a writ of replevin, duly issued by a justice of the peace, seized and took the property of plaintiff, as such marshal, “*claiming* to act under and by virtue of such writ of replevin,” was decided to set forth no cause of action. The court said, in effect, that if the officer had such a writ, “it should have been so charged in the complaint; it must appear that he was acting under process, and not claiming to act in the

¹ Reynolds v. Hurst, 18 W. Va. 648.

² Stanton v. State, 82 Ind. 463, 466; Blasingame v. Blasingame, 24 Ind. 86; Keegan v. Carpenter, 47 Ind. 597.

execution of process.” The court, therefore, concluded that the surety of the officer could not be held liable on his official bond, as the allegation of the complaint only amounted to a charge that the officer acted *colore officii*, that he claimed to have, not that he had, legal process.¹

§ 534. Pleading — What it is necessary to allege in action on official bond. — In an action on an official bond the declaration is sufficient if it sets forth all that it is necessary for the plaintiff to prove. That is a general rule of pleading,² and under it a declaration upon a sheriff’s official bond is sufficient, if its only defect is the failure to allege that the judgment upon which an execution was issued, has not been satisfied. A declaration for a false return of *nulla bona* is sufficient, if it shows the contract made by the official bond, and a breach of that contract by the false return. Any further allegations as, for example, that the execution defendant had not paid the money after the return is merely surplusage. The *gist* of such an action is the breach of the bond.³

§ 535. Same subject continued. — A declaration in an action against an officer and his sureties, which states that the officer collected money from plaintiffs under pretense that he had executions against them, and afterwards failed to return such executions satisfied, and which does not aver that he had any valid execution in his hands at the time of the receipt of the money, is not sufficient to charge the sureties. What is necessary to charge them is an averment that the act complained of is not only one which might be rightfully done by an officer, but one which was actually

¹ *Gerber v. Ackley*, 37 Wis. 43; *Griffith v. Smith*, 22 Wis. 646; *Battis v. Hamlin*, 22 Wis. 669. See, also, *State v. Mann*, 21 Wis. 684; *Seeley v. Birdsall*, 15 Johns. 267; *Morris v. VanVoast*, 19 Wend. 223.

² *Hool v. Bell*, 1 Ld. Raymd. 174.

³ *Lucas v. The Governor*, 6 Ala. 826, 828.

done by him acting as such officer, under claim of a right to do so by virtue of his office.¹

§ 536. Same subject continued. — In an action on an official bond it is essential that the matter of complaint should be fully stated in the declaration, that the rules of good pleading should be observed, and every conclusion except that of a breach of the condition of the bond should be excluded. Thus, in an action against a constable and his sureties for neglect in the discharge of his duty by the officer, it was held that the declaration was defective in not alleging facts necessary to give jurisdiction to the justice, in the cause in which the execution in question was issued. In pleading the proceedings of inferior courts or jurisdictions, it is not sufficient to allege that the court had jurisdiction, but the facts must be stated which are necessary to confer that jurisdiction.² And an allegation that the officer did not levy upon the property of the defendant or take his body, is insufficient to charge him with a failure to do his duty, because it does not aver that the execution defendant had property, or that his person could be found. *Non constat* that the defendant had any property or was within the jurisdiction. It is, however, a good breach that the officer did not return the execution within the time prescribed by law, for that was manifestly his duty.³

§ 537. Same subject continued. — In an action on an official bond it is very important that the breach be properly assigned. The rule of pleading on this subject is that the breach is well assigned if it be in the words of the contract, either negatively or affirmatively, or in words

¹ Commonwealth *v.* Cole, 7 B. Monr. 250.

² Cleaveland *v.* Rogers, 6 Wend. 438; Ladbroke *v.* James, Willes, 199; Lawton *v.* Erwin, 9 Wend. 233, 236; Service *v.* Hermance, 1 Johns. 94; Mills *v.* Martin, 19 Johns. 7, 36.

³ Lawton *v.* Erwin, 9 Wend. 233, 237; Sloan *v.* Case, 10 Wend. 265; 25 Am. Dec. 569; Carpenter *v.* Doody, 1 Hilt. 465.

co-extensive with the import and effect of it. This is not only the general but perhaps the universal rule, where the contract or condition of the bond provides for a single act to be done; but where it requires many things, the omission of any one of which would constitute a breach, a particular breach must be specified in the assignment. Thus, where the condition of the bond was that the sheriff should in all things perform the duties of his office, and it was assigned as a breach that he did *not* in all things perform, etc., the assignment was held to be too general. The object of the assignment of a breach is to apprise the party what he is called upon to answer, which so general an assignment manifestly fails to do.¹

§ 538. Declaration must lay foundation for proof.—

The bond of a United States collector is not invalid, if it omits to set forth the district for which he was appointed, because the courts will take judicial notice of collection districts and other subdivisions of the country by public law, which are matters of record. But in a declaration on such a bond, it is necessary that there should be a distinct averment that the officer in question had been appointed collector for a specified district. If there is no such averment there is no foundation for proof of that fact by the production of the commission or otherwise, nor could such proof be introduced after judgment by default, nor could an issue be taken as to his appointment or obligation to perform the duties of such office in any particular district, if there is no averment of such an obligation. Such a declaration on such a bond is bad on demurrer.²

§ 539. Rule that refusal to pay penalty upon demand must be averred, does not apply to official bonds.—

¹ *People v. Brush*, 6 Wend. 454, 456.

² *United States v. Jackson*, 14 Otto (104 U. S.), 41, 44; *s. c.*, 4 Meyer's Fed. Dec., §§ 227, 229.

It is a rule of pleading in suits upon ordinary bonds with condition, that the declaration must allege not only a breach of the condition but the refusal of the obligor to pay the penalty of the bond. . This rule does not apply to actions upon statutory and official bonds, which are made payable to the state for the benefit of all persons who may be aggrieved by the misconduct of the officer. No man in the state is competent to receive the amount of the penalty or to exonerate the officer, and for this reason it is obviously improper to aver in the declaration the non-payment of the penalty.¹

§ 540. Declaration must show breach, and exclude every other conclusion. — In official bonds, there being no debt originally due, there can obviously be no cause of action until a breach of the condition of the bond be committed. Of course, therefore, in a declaration upon such an instrument not only must the facts supposed to constitute such a breach be distinctly stated, but the statement must be preceded by such allegations as effectually exclude any other conclusion than that a breach of the condition has actually taken place. Thus a breach that a collector of taxes had “wholly failed and neglected to discharge his duty as such collector,” is insufficient, being too vague and general, not specifying *how* and in what manner or respect the collector had “failed and neglected,” etc. And a breach that the collector had failed and neglected “to pay over the taxes assessed on said county,” was also imperfect, because it might be literally true and yet the collector might be blameless. The assessment roll might not have been filed, or a copy of it, together with the proper precept, might not have passed into the possession of the collector, who, of course, could neither collect nor pay over taxes without them. All these preliminary matters must be shown by

¹ *State v. McClaus*, 2 Blkfd. (Ind.) 192, 194.

appropriate averments before the breach of the bond is sufficiently set forth.¹

§ 541. **Same subject continued.** — In an action against a collector of internal revenue the breach assigned was that the principal defendant did not faithfully perform his duties, but received the sum of \$64,000, which he never accounted for or paid over to the United States. Under this breach evidence was offered that he had failed to make collections, and it was held that such evidence was not admissible, and that failure to collect is not the same thing as failure to pay over.²

§ 542. **Averments necessary to charge marshal for taking insufficient surety on bond.** — It is a rule, without an exception, that in a declaration such averments should be made as if proved or admitted, will entitle the plaintiff to the judgment he seeks. If, therefore, in an action on the official bond of a ministerial officer, it be charged that he failed to take sufficient security on a bond which it was his duty to take, the averment is adequate, without alleging either that he knew that the security was insufficient, or that he failed to make diligent inquiry as to its sufficiency. The good faith of the officer and his diligence in trying to obtain the proper security are matters of defense, and must be pleaded and proved. The fact of the insufficiency of the security rebuts the presumption in favor of the officer and throws upon him the *onus of justifying or excusing his conduct.*³

¹ *Evans v. The State*, 2 Blkfd. 388; *Shum v. Farrington*, 1 Bos. & P. 640; *Cornwallis v. Savery*, 2 Burrow. 772; *Cheshire Bank v. Robinson*, 2 N. H. 126. See, also, *Evans v. State*, 3 Blkfd. 379; *Graham v. State*, 6 Blackfd. 82.

² *United States v. Glenn*, 1 Woods (U. S. C. C.), 400, 401; *s. c.*, 4 Myer's Fed. Dec., § 255.

³ *Bispham v. Taylor*, 2 McLean C. C. 355.

§ 543. A variance that is amendable — If a declaration on a bond avers that the bond is made payable to the “board of supervisors,” etc., and the bond produced is payable to the “supervisors,” etc., the variance is amendable, and the plaintiffs may declare in their corporate name and aver that the bond was made payable to them in the name mentioned in it.¹

§ 544. When unnecessary to indicate in a declaration on an official bond who is the beneficiary of the action. — Where the official bond of a tax collector is made payable to the governor of the state, in accordance with the statute, a suit may properly be brought upon it in the name of the governor, or his successor in office, without indicating in the pleadings that such suit is brought for the use of the state. The official character of the obligor and the obligee, and the fact that the suit was brought on the official bond of the former for his default in not paying over taxes collected by him is sufficient, without more, to show that the state is the real plaintiff. It is essential, however, that in such a case, the breach assigned should be that due assessments of taxes were made, and that the officer failed to pay over the money collected on such assessment of taxes. Sureties are bound for the collection and payment of these taxes, but not for other money which may come to the hands of their principal, and, therefore, the breach should show distinctly that the officer failed to pay the money for which the sureties were bound, the due assessment of the taxes being an essential prerequisite to the liability of the sureties. And it was further held, that it was erroneous to join in the same breach a failure to pay state and county taxes. The judgment, it was said by the court, could not designate what

¹ *Supervisors, etc., v. Coppenbury*, 1 Mich. 355; *New York, etc., Co. v. Vauck*, 13 Johns. 38.

portion of the recovery belonged to the state and what to the county.¹

§ 545. What is necessary to allege to charge sureties of an officer with liability for a trespass. — In an action on the official bond of a sheriff for a trespass in taking goods under color of legal process, it is necessary in order to charge the sureties that it be averred that they participated in the trespass, or that the sheriff executed the bond. Otherwise there is a misjoinder of action, the sheriff being charged in *tort* and his co-defendants, his sureties, with a liability arising *ex contractu*. It is further necessary to aver that the sureties “executed” the bond, for the statement that they were “securities” is a conclusion of law and not issuable, and moreover, it is essential that the bond be set out *in haec verba*, or its tenor and effect so stated that it may appear that its terms include the liability sought to be imposed on the sureties. Unless this is done, *non constat* that it bound those who signed it to indemnify parties injured by the sheriff’s malfeasances.²

§ 546. Damages on official bond may be laid in excess of penalty. — The question whether or not in any case damages in excess of the penalty of an official bond can be recovered, has been considered elsewhere. It is at any rate admissible to lay the damages in the declaration at a sum exceeding the penalty, in view of the fact that the judgment may be for a greater sum than the penalty, on account of interest that may be awarded.³

§ 547. Declaration need not negative matter that would be no defense to the action. — In an action on an attach-

¹ *Whitfield v. Wooldridge*, 23 Miss. 183.

² *Ghiradelli v. Bourland*, 32 Cal. 585.

³ *Commonwealth v. Lynd*, 14 Penn. 144; *Boyd v. Boyd*, 1 Watts, 365; *Hughes v. Hughes*, 54 Penn. St. 240; *Insurance Co. v. Seckel*, 8 Philad. 92.

ment bond, it is not necessary in stating the breach of the bond to aver that an affidavit had been filed on which the attachment was issued, it is sufficient to aver and prove that the plaintiff had suffered the loss against which the bond was designed to indemnify him. He is not required to prove that an affidavit had been filed because the want of it would be no defense to the action.¹

§ 548. Allegations which are irrelevant or absurd may be disregarded as surplusage.—The execution and delivery of an official bond is complete when it, being proper in form and substance, is signed and sealed by the obligors, approved by the proper officer, and filed in the office appointed by law. If being made payable to a state, action is brought upon it in the name of a county, it is not proper that it be averred to have been delivered to that county, especially if that county had not then been created, and an averment that it had been so delivered must be disregarded. The rule that a pleading must be construed most strongly against the pleader does not require such a construction to be given as will make the pleading absurd.²

§ 549. A rule as to the recital of the interests of the beneficiaries of an action on an official bond.—When an action on an official bond is instituted in the name of the official obligee at the relation, or for the use, of the parties injured, and those parties chance to be members of a partnership or firm, the suit should be “on the relation,” or “for the use of” the partnership as such, and any private arrangements made by the partners respecting the beneficial interest in the claim, should be so far ignored as not to appear in the record or in the title of the case.³

¹ *Trentman v. Wiley*, 85 Ind. 33, 35.

² *Sacramento County v. Bird*, 31 Cal. 67, 74.

³ *State v. Lightfoot*, 2 Ired. L. 306. See, also, *State v. Farmer*, 10 Ired. L. 45; *State v. Corpening*, 10 Ired. L. 58; *Governor v. Deaver*, 3 Ired. L. 66; *Govenor v. Franklin*, 4 Hawks, 274.

§ 550. Matters of evidence not to be set out in declaration. — While it is true, that in an action on an official bond, it is necessary that there should be set out a sufficient breach, and all proper preliminary averments necessary to negative every other conclusion than the one desired, it is neither proper nor essential that the pleading should include mere matters of evidence. Thus, in an action against a collector of taxes and his sureties, it was alleged in the declaration that an assessor had been appointed who gave bond and took the prescribed oath, and made the assessment and delivered the list to the board of commissioners, etc. It was decided to be unnecessary and improper to state *how* he made the assessment, that the townships were arranged in alphabetical order, that the assessment was made in actual view of the lands, that the lands of residents and non-residents were separately assessed, etc. So far as these things were material, they were matters of evidence.¹

§ 551. What is not a sufficient statement in a declaration of a breach of an official bond. — To sustain an action on an official bond, it is of course necessary that the declaration, and all necessary and appropriate preliminary averments should state distinctly a breach of the bond. It is not a sufficient statement of a breach that a constable holding an execution, “did not cause the money to be made according to the exigency of said writ, * * * but returned the same to the office of the justice aforesaid, with a promise in writing indorsed thereon” of a third person that he would pay the debt within eight months if the defendant did not. The court held that the declaration should have averred that the execution debtor has property on which the constable might have levied.²

¹ State *v.* Leonard, 6 Blkfd. (Ind.) 173.

² State *v.* Sovern, 6 Blkfd. 168; Jones *v.* Clayton, 4 Maule & S. 349.

§ 552. What is a sufficient assignment in a declaration of a breach of an official bond. — In an action on a sheriff's official bond, it is a sufficient assignment of a breach of the condition of the bond, that the sheriff conducted an official sale in an illegal and fraudulent manner. This averment is compounded of law and fact, and is traversible. If the plea denied that the sale was so conducted, the plaintiff would be compelled to show by proof the facts which constituted the illegal and fraudulent manner, and this proof would be matter for the consideration of the jury. The charge, therefore, that the sale was conducted in an illegal and fraudulent manner is not the averment of a mere conclusion of law.¹

§ 553. Parties — Plaintiffs in an action on an official bond must have like interests, legal or equitable. — In an action on an official bond it is essential that the parties for whose use or upon whose relation the suit is brought in the name of the official obligee, shall have a legal interest in the subject-matter of the suit, and if there are two or more interested, some holding a legal interest and others an equitable interest in the matter in controversy, they cannot be joined as parties in the same suit upon a joint bond. Thus, where a person was guardian for two orphans, one of whom died, the survivor could not be joined as a plaintiff with the heirs of the deceased orphan. The legal right was in the personal representative of the deceased, and of course he held the legal remedy also. The heirs of the ward had but an equitable claim, which could only be enforced through the personal representative.²

§ 554. Plaintiff in action on official bond must assign no breaches that do not concern him. — The right of a party to sue in the name of the state on an official bond is

¹ State v. Gresham, 1 Ind. 190, 192; Philips v. Bacon, 9 East, 299.

² Montgomery v. Commonwealth, 1 T. B. Mon. 197.

co-extensive with the injury he has sustained, and if, therefore, he assigns breaches which, although they may be a forfeiture of the bond in respect of other persons, do not concern him, he having suffered no injury in consequence of them, the declaration is bad. Having thus assigned breaches that give him no cause of action, the presumption is that the jury assessed damages upon them, and as he is not entitled to such damages, it is erroneous to enter judgment upon such a verdict.¹

§ 555. What is necessary to allege as to breach of condition of an official bond.—In an action against the sureties of an officer for his failure to collect and pay over the money on an execution, it is necessary that the declaration should allege that the execution was placed in the hands of the officer within the time for which the sureties were responsible for his conduct, or that it was placed in his hands during the time for which the bond was executed, and that the money was collected by him during his continuance in office. And when the bond is joint and several it is not necessary to notice the death of the principal or to charge a default of payment by his legal representatives. It is sufficient to charge that the defendant sureties, although often requested, etc., did not pay.²

§ 556. Same subject continued.—In an action against a sheriff on his official bond for failure to pay over money collected, it is necessary that the declaration should allege a demand of the money and a refusal to pay it. A count in which there is no such averment is bad, for no cause of action could arise otherwise than upon a refusal to pay upon demand by the proper party, of the money collected upon the execution. A breach, however, which charges a sheriff

¹ *Brownfield v. Commonwealth*, 18 Serg. & R. 236.

² *Commonwealth v. Hughes*, 10 B. Monr. 160; *Commonwealth v. Hughes*, 10 B. Monr. 461.

with a failure to return an execution according to law, is good, for it is the sheriff's duty to return the execution, and he is liable as well if he fails to make any return as if he makes a false return.¹

§ 557. What is an insufficient allegation of a breach of an official bond. — In declaring on an official bond it is necessary for the plaintiff to set forth clearly and distinctly in what manner he has been damaged by the failure of the officer to discharge his duty. So a declaration alleging that a sheriff, having levied on property, failed to sell it, sets forth no cause of action, for the charge might be true and yet the sheriff be in no default. *Non constat* that the defendant did not pay the money and release the property. What the law requires of the sheriff is not that he should, of course, sell property levied on, but that he should have the money before the court upon the return day of the execution. His failure to do this without a good excuse for it, is a breach of his bond for which an action may be maintained.²

§ 558. Same subject continued. — In declaring in an action on an official bond it is essential that the breach should clearly and distinctly charge the manner in which the plaintiff had been damaged by the failure of the officer to discharge his duty. If it is averred that an officer committed a breach of the condition by not levying the execution upon the property of the defendant, such an allegation states no cause of action, because there is in it no assertion or charge that during the lifetime of the execution the defendant had any property upon which a levy could be made.³

¹ Governor *v.* Pleasants, 4 Ark. 193, 195.

² State *v.* Engles, 5 Ark. 26.

³ State *v.* Kirby, 6 Ark. 458.

§ 559. Same subject continued. — In an action on the official bond of an officer it is necessary in stating the breach to aver not only that he did not levy and sell, but that he did not have the money before the court upon the return day of his process. Until he has failed to discharge his duty in this respect a cause of action against him has not accrued and a declaration omitting this material averment is fatally defective. And if the statement of one breach is insufficient to show a cause of action it cannot be aided by averments of facts contained in a preceding statement of another alleged breach.¹

§ 560. Profert when dispensed with — Rule where there are several breaches some good and some bad. — It is a general rule of pleading that profert must be made of all instruments of writing upon which the plaintiff relies as the foundation of his action. When, however, such writings are public records or official bonds in the archives of the state, and of course not within the control of the plaintiff, no profert is necessary, and it is sufficient to produce in evidence a duly authenticated copy of such record or bond, and in offering to produce a copy of a bond it is not necessary to mention the "condition thereof," for the condition is, in this connection, at least, regarded as a part of the bond. And as a further rule of pleading it may be said, that where there are several breaches assigned in a declaration, some good and others bad, on demurrer, the judgment must be for the plaintiff.²

§ 561. What is necessary to set out in a declaration on an official bond. — In an action on a bond which has several conditions it is essential that the plaintiff set out

¹ State *v.* Holleman, 21 Ark. 413; Lyons *v.* Evans, 1 Ark. 349; Phillips *v.* Governor, 2 Ark. 382; State *v.* Engles, 5 Ark. 26; State *v.* Hammett, 7 Ark. 492.

² Adams *v.* State, use, etc., 6 Ark. 497; Sumner *v.* Ford, 3 Ark. 404.

breaches of each condition upon which he hopes to recover, for no judgment can be rendered upon a breach of one condition, upon the assignment of a breach of another. The rule is that the recovery must be upon the breaches set out in the complaint.¹

§ 562. **Same subject continued.** — In a suit upon a bond it is necessary to assign each several breach of the bond on which the plaintiff hopes to recover. Each assignment stands upon the footing of a count in a declaration, and a general demurrer to the whole declaration will not be held to apply to each several breach. Consequently, under a well known rule of pleading, if any one of the breaches is well assigned the demurrer will be overruled as to all.²

§ 563. **Same subject continued** — In an action on the official bond of a justice of the peace in Illinois it is sufficient to allege as a breach of his *first* bond (he having held a second term), that he received notes for collection during his first term, and during that term collected money upon them, and neglected and refused to pay over the money or to return the notes, and that he carried the money away with him when he absconded, which was during his second term. The court said that as it was not his duty to pass over the money to his successor, he could not be presumed to have held it under or by virtue of his second term of office, and that the receipt of the money fixed the official obligation properly to apply it.³ His liability, it is believed, was fixed by the demand and refusal to pay, not by the receipt of the money.

§ 564. **Same subject continued** — In an action on the official bond of a constable, or like collecting officer, for a

¹ *Colgate v. Roberts*, 85 Ind. 464.

² *People v. Gregory*, 11 Bradw. (Ill. App.) 370.

³ *County of Warren v. Jeffrey*, 18 Ill. 329; *Freeholders of Warren v. Wilson*, 16 N. J. L. 110; *Governor v. Lee*, 4 Dev. & Batt. 457.

failure to pay over money collected by him, it is a sufficient assignment of a breach, to state that the relator had placed in the officer's hands divers claims set out in a receipt annexed to the declaration, and to aver that the officer had collected the claims but failed and refused to pay the money to the relator. And in such a case the receipt of the officer is admissible in evidence, even if by a mistake, there is a variance between it and the list of claims enumerated in the declaration. The receipt is evidence as far as it consists with the pleading.¹

§ 565. Same subject continued. — When an action is brought on an official bond, it is held, in Indiana, that it is competent for the plaintiff to assign several breaches in one paragraph, or *count*, as it would be called elsewhere. The court says: "In such a case there is but one cause of action and that is the bond upon which the pleading is based. * * * Where several breaches are assigned, and they are distinct and independent, demurrs may be addressed to each breach. The general rule is that parts of a paragraph cannot be demurred to, but our cases recognize as exceptions to this rule, cases where there are separate and distinct assignments of breaches. If, however, there is one good assignment of breach, and the demurrer is addressed to the entire complaint (or declaration) it should be overruled."²

§ 566. What is too general an assignment of a breach. — An assignment of a breach of an officer for a general misfeasance in office, is too general and too broad. It fails to give such information that the defendant could know how to defend himself. Under so general an allegation the court should decline to receive any evidence.³

¹ Governor *v.* Roach, 9 Gratt. 13, 15.

² McFall *v.* Howe, etc., Co. 90 Ind. 148; Colburn *v.* State, 47 Ind. 310; Richardson *v.* State, 55 Ind. 381.

³ Governor *v.* Harrison, 4 Dev. & B. 461.

§ 567. Defense — Presumption — Defective declaration.—A declaration on an official bond in which the breach assigned is that the defendant, being clerk and master and receiver, had taken insufficient security on a bond which he was required by the court to exact from a party to a cause, is insufficient and bad on demurrer, if it fail to charge that the defendant acted in bad faith in taking such security. The presumption of law is that the officer acted in good faith and exercised his best judgment, and unless the declaration negatives this presumption, it fails to show any cause of action.¹

§ 568. Same subject continued.—And in such a case, if the relator in the action against the officer accepted the bond alleged to be insufficient, and received from its obligors a sum of money in satisfaction thereof; it is competent for the officer to plead that fact in defense of the action, and such defense, if proved or admitted, is conclusive in his favor.²

§ 569. Effect of a sufficient plea — What is such a plea.—It is a well established rule of pleading that if any one of several pleas constitutes a full defense to the action, it disposes, of course, of all other questions in the record. Thus, in an action on an official bond, the plaintiff charged that the defendant, a sheriff, had not paid over the proceeds of an execution. The defendant pleaded that the plaintiff being also plaintiff in the execution in question, and holding several other (junior) executions against the same defendant, had himself become the purchaser of the property seized, and claimed and retained the purchase-money to the amount of the

¹ Bevins v. Ramsey, 15 How. (56 U. S.) 179, 188; *s. c.*, Myers' Fed. Dec., §§ 251, 252.

² Bevins v. Ramsey, 15 How. (56 U. S.) 179, 188; *s. c.*, Myers' Fed. Dec., § 252.

execution. The plaintiff replied that he did not retain the money to the amount of that execution and on account of it. A demurrer to this replication was sustained, the court holding that it admitted that the money was retained, but denied that it was retained on account of that execution, and if the plaintiff retained the money he was liable to the sheriff for it, and could only excuse himself by showing that he held executions to which the law would apply the money. And further, if the plaintiff held a senior and a junior execution and retained the purchase-money, he was bound to apply it to the senior execution, even if the sale had been made upon the junior execution, for the property was in his hands, liable to seizure under the senior execution.¹

§ 570. Answer or plea must exclude the conclusion set up in declaration.—It is a good rule of pleading that the plea or answer shall respond fully to the declaration or complaint, and exclude the conclusion set up therein. Thus, in an action on the official bond of an officer for not returning a writ of *venditioni exponas*, or for a false return to such a writ, it is a bad plea that the officer never received the property described in the writ. That might have been very true and still the officer have been guilty of the default charged. It was his duty to return the process in any event, and in no event could he be justified in making a false return.²

§ 571. What defendants cannot deny by plea.—It is not competent for an officer or his sureties in defense of an action on his official bond, to deny the validity or regularity of a judgment, under which was issued the execution upon which he had acted and collected money. Having recognized the validity of the execution by collect-

¹ *Brown v. Hamlin*, 28 Miss. 392.

² *State v. Youmans*, 1 Ind. 90.

ing the money under its authority, it is not for the officer to say that the judgment was void, irregular, or erroneous. If the process was regular upon its face it was the duty of the officer to execute it, and he, being protected by it, cannot go behind it to assail the judgment upon which it was issued.¹

§ 572. Parties—Effect of death of plaintiff on the pleas available for defendants.—It is well settled that when a suit is brought on a private bond for the use of another person than the obligee, such *cestui que use*, is not the legal plaintiff, the use being only entered for the protection of his equitable interest. If, therefore, such a person shall die pending the action, his death is not the subject of a plea, nor is there, for the purposes of the suit, any necessity of suggesting his death, for the suit goes on without reference to his life or death. The judgment in such case is rendered in favor of the nominal plaintiff, and it does not concern the defendant who may enjoy the fruits of the litigation. In accord and analogy with this rule it has been held that when an official bond has been made payable to the state, and suit brought in the name of the state for the use of a municipal corporation which becomes extinct pending the litigation, the action survives and judgment may be rendered for the state, and for the use of whoever is, at the date of its rendition, entitled to the beneficial interest. In such a case there is indeed no necessity or special propriety in entering a use at all. The state is the plaintiff, and it does not concern the defendant for whom the state may have brought the suit.²

§ 573. Provisoes and exceptions are matters of defense — Must appear by plea.—In an action on a sheriff's

¹ *State v. Hicks*, 2 Blkfd. (Ind.) 236; 20 Am. Dec. 118; *People v. Waters*, 1 Johns. Cas. 137; *Smith v. Bowker*, 1 Mass. 81; *Wakefield v. Lithgrow*, 3 Mass. 251.

² *State v. Dorsey*, 3 Gill & J. 75, 93.

bond it is not necessary that the plaintiff allege in his declaration that the sheriff has been commissioned, although the statute of the state declares that no recognizance or obligation of the kind shall be in force, unless the party elected be commissioned. The rule is that a party claiming the benefit of a proviso or exception, must bring himself within it by pleading. If the defendant omits to plead that the sheriff has not been commissioned, the omission admits that he has been.¹

§ 574. What is an insufficient plea to an action for failing to return process. — When an action is brought on the official bond of a sheriff for failing to return an execution, it is an insufficient plea and bad on demurrer, that by the plaintiff's direction he had returned the execution to a county different from that from which it had been issued. The duty of the sheriff is to return the process according to its mandate. And it is not a sufficient plea that there is a variance between the execution and the judgment upon which it purports to be founded. If the execution is regular upon its face, it is the duty of the sheriff to carry it into effect, although he may escape responsibility for failure to do so, if he can show that it issued upon a void judgment or no judgment at all.²

§ 575. Defect in declaration that can only be met by special demurrer. — If a complaint or declaration avers the execution by the principal in an official bond, and the copy of the instrument produced in court does not show his signature, the error must be taken advantage of in the trial court by special demurrer setting forth the variance. The question cannot be raised for the first time in an appellate court, and the complaint is good after verdict.³

¹ *Brownfield v. Commonwealth*, 13 Serg. & R. 238.

² *State use, etc., v. Sadler*, 6 Ark. 235. See, also, *Parmlee v. Hitchcock*, 12 Wend. 96; *Ten Eyck v. Walker*, 4 Wend. 462; *Jackson v. Anderson*, 4 Wend. 474; *Jackson v. Hunter*, 4 Wend. 585.

³ *Meadocino County v. Morris*, 32 Cal. 145.

§ 576. A plea that plaintiff has not been damnified, when not good. — In an action on the bond of a deputy collector of taxes given to a principal collector, it is not a competent defense either for him or his sureties, that the plaintiff has not been damnified because he has not been compelled to pay to the county the amount which was withheld by the deputy. The bond of the deputy is not a mere indemnity to the collector. It is the bond of a subordinate whose duty it is to pay the money he collects to his principal, and to whom it is no concern whatever what his principal does with the money after he gets it.¹

§ 577. What is not a good plea to an action on a deputy's bond. — When an action is brought on an official bond by the sheriff against his deputy and sureties, it is not an admissible plea that the misfeasances charged as the breach of the condition of the bond were committed by the leave and license of the plaintiff, for that purpose first given and granted. If the plea means that the deputy was discharged from the obligation of his bond, the plea is bad, because it does not state that he was so discharged by a writing under seal; if it means that the plaintiff agreed that the deputy might keep the money the non-payment of which was the alleged breach of the condition of the bond, the plea is bad in that it fails to state any consideration whatever for such an agreement. Upon the defendant's own showing it was *nudum pactum*. And in this connection it may be said that the plea of *nil debet* is no proper answer to a declaration on a bond assigning breaches; and that a plea is bad which responds to the damages, not to the breaches.²

§ 578. Nil debet, when not a good plea—Effect of joining issue upon it. — In an action of debt on an official

¹ Post v. Sheppard, 4 Gill, 276.

² Hart v. Brady, 1 Sandfd. (L.) 626; Jansen v. Ostrander, 1 Cowen, 670; Delacroix v. Buckley, 13 Wend. 71; Barnard v. Darling, 11 Wend. 27; Suydam v. Jones, 10 Wend. 184; 25 Am Dec 552.

bond *nil debet* is not a proper plea to a declaration which sets out breaches of the condition of the bond, but if it is pleaded and issue be taken upon it, the plaintiff is obliged to prove every material allegation in his declaration. And if a variance appears between the bond as set out in the declaration, and that produced upon *oyer*, the defect should be taken advantage of by demurrer, the defendant cannot rely upon it upon the trial of the issue.¹

§ 579. What is not a good replication to a plea of former recovery. — If in an action on an official bond a former recovery has been pleaded, it is not a good replication that the breaches of the bond which had occurred before the institution of the former action, and which should have been included in it, were not known to the plaintiff when the former action was brought. There can be but one action on one cause of action, and (in the absence of fraud on the part of the defendant), if the plaintiff, having a right to recover a large amount for the breach of a bond, recovers a smaller sum, he cannot afterwards recover an additional amount for such pre-existing cause of action. The right of action is exhausted by the first suit and it is a bar to the second.²

§ 580. Further and miscellaneous rulings on pleadings on official bonds. — When a bond is joint and several, the obligees may sue one of the obligors, although one of the plaintiffs is also an obligor in the same bond. This seems to be the rule at common law; certainly if the obligee of a joint and several bond happens to be made the executor of one of the obligors, he can nevertheless maintain an action against the other obligors.³ So far as official bonds

¹ *Janssen v. Ostrander*, 1 Cowen, 670.

² *State v. Morrison*, 60 Miss. 74. See, also, *Bendernagle v. Cock*, 19 Wend. 207; 32 Am. Dec. 448; *Secor v. Sturgis*, 16 N. Y. 548; 2 Smith's Ldg. Cases, p. 671 (original paging).

³ *Cock v. Cross*, 2 Lev. 73.

in Florida are concerned, it is provided by statute in that state, that the assignee of such a bond may sue in his own name, and under that act he may maintain such a suit, although an obligor of the bond was also an obligee.¹

When the defense relied upon is that the instrument which forms the foundation of the action is a mere escrow, it is not sufficient to plead, as a special plea of *non est factum*, that the bond was signed upon the condition that another (named) party should sign it, and that such person never did sign it. “To make the instrument such (an escrow) the plea ought to have averred that the supposed bond was delivered to some third person to be delivered to the obligee only on the performance of the condition pleaded. For want of such averment the plea is bad, and the demurrer to it is sustained.”² And a plea is equally defective which states that the instrument has been materially altered “without the consent, direction or authority of the defendant.” It should also aver that the alteration was made by, or with, the consent of the plaintiff. If such alteration (affixing seals) were done by a stranger it would not vitiate it, but would render the instrument void if done by the plaintiff. Hence the necessity of so charging the alteration as to fix upon the plaintiff the responsibility therefor.³

§ 581. Same subject continued.—It has already been said that breaches of the condition of the bond, may be assigned either in the declaration, or in a replication to a general plea of covenants performed. In either case, however, plaintiff must assign the breaches before judgment can be rendered. If they are not assigned in the

¹ Bradford *v.* Williams, 4 How. (45 U. S.), 576, 588; 4 Myers' Fed. Dec., §§ 19, 20.

² United States *v.* Dair, 4 Biss. (C. C.) 280.

³ United States *v.* Linn, 1 How. (42 U. S.) 104.

declaration and the defendant fails to plead, they must be suggested of record, for a judgment by default without an assignment of breaches is erroneous.¹ A breach is well assigned if it is a direct negative in the very words of the condition.² And the assignment of a breach in one form or another is in all cases an essential part of the record.³ And especially is this the case when the declaration setting forth the penalty and condition fails to show that there is any cause of action, unless there has been a breach of the condition, the mere averment that the penalty was not paid is not sufficient even after verdict. Without a breach duly alleged, *non constat* that the obligors were bound to pay the penalty at all.⁴

§ 582. Same subject continued. — It is a familiar rule of pleading that oyer must be demanded of instruments described but not set out in the declaration, if any defense by plea or demurrer is to be made on account of their deficiency. A demand of oyer of a bond does not include a demand for the condition also. If oyer of that is desired it must be asked for. They are regarded in law as separate instruments.⁵ And if upon oyer there is a material variance as in the date of the bond say, January 3d, in the bond, October 3d, in the declaration, the variance is fatal.⁶ It is a well settled rule that no one can sue upon an official bond except its obligee, unless the right to sue has been conferred by statute. Consequently when a bond was given to a municipal corporation by the holder of a priv-

Burnett *v.* Wylie, Hempst. 197; Robbins *v.* Pope, Hempst. 219.

² United States *v.* Spalding, 2 Mason C. C. 485. In this case Mr. Justice Story cites, Heyford *v.* Reeves, Yelv. 40; Procter *v.* Burdett, 3 Lev. 170; Lee *v.* Johnson, 1 Lutwyche, 326, 329.

³ Dixon *v.* United States, 1 Marsh. 17

⁴ Hazel *v.* Waters, 3 Cranch C. C. 682.

⁵ United States *v.* Sawyer, 1 Gall. 86.

⁶ Cooke *v.* Graham, 2 Cr. (6 U. S.) 229.

ilege or franchise (vending lottery tickets) no suit could be sustained upon the bond by the holder of a ticket, neither the statute nor the by-law having conferred the right to bring suit, upon holders of the lottery tickets.¹

The plea of set-off is not admissible in favor of an officer of the United States if it be founded on credits which have not been disallowed by the proper accounting officer. It is elsewhere shown in this work that by act of congress no claim against the government by one of its officers, can be recognized by the courts unless it be shown not only, that the claim is just and legitimate, but that the claimant had been denied credit for it by the proper department. As, therefore, a claim which has not been so rejected, cannot be allowed as a set-off or counter-claim in an action on an official bond, a plea setting it up is bad.²

It is a rule of pleading applicable as well to actions on official bonds as to all other actions, that a plea which is bad in part, is bad *in toto*. If two defendants join in a plea sufficient as to one, but bad as to the other, it is bad as to both. Thus, where a number of defendants joined in a plea of *non est factum* on the ground that seals were added to their signatures without their consent, and it appeared that one of their number had himself added the seals, the plea being, of course, bad as to him, was held bad as to all other defendants who had joined with him in it.³

§ 583. Estoppel of obligors in official bonds. — The obligors in an official bond are estopped from denying anything expressed in the bond, or fairly deducible from its terms. Thus the sureties or a sheriff cannot deny that he was a sheriff at the date of a bond; and the law will pre-

¹ Corporation of Washington *v.* Young, 10 Wheat (23 U. S.) 406.

² Watkins *v.* United States, 9 Wall. (76 U. S.) 759; 4 Myers' Fed. Dec., §§ 335, 338.

³ United States *v.* Linn, 1 How. (42 U. S.) 104.

sume from that fact that he continued to be sheriff throughout the term for which he had been elected. The sureties cannot, therefore, be heard to say, that by not giving bond in due season, their principal had vacated his office between the time of his election, and the time when he with them executed the bond which had been put in suit.¹

¹ *Morris v. State use, etc.*, 22 Ark. 524; *Badgett v. Martin*, 12 Ark. 744; *Sullivan v. Pierce*, 10 Ark. 508; *Outlaw v. Yell*, 8 Ark. 353. See, also, *State Swiggert*, 22 Ark. 528.

CHAPTER XVIII.

EVIDENCE IN ACTIONS ON OFFICIAL BONDS.

- SECTION 590.** General principles of evidence applicable in actions on official bonds.
591. Rules of evidence prescribed by statute in actions on official bonds.
592. Evidence in action on official bond must show a real substantial legal interest in the beneficiary of the action.
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606. Record of an amerciament is not evidence of a breach of their bond, as against sureties.
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608. Rule absolute against sheriff in Georgia, is only *prima facie* against his sureties.

- SECTION 609. What is a sufficient production in evidence of a paper, of which profert has been made, which is matter of record.
610. What is competent and sufficient evidence in an action on a deputy's bond.
611. Same subject continued.
612. Penalty or liquidated damages, a question of evidence for the court. — Rule as to evidence in such case.
613. Evidence of character of principal in official bond, inadmissible.

§ 590. General principles of evidence applicable in actions on official bonds. — In the matter of evidence available to support or defeat an action on an official bond, there is little difference between such an action and any other suit brought upon a specialty. It is true that in the case of a public officer there is always a legal presumption that he has done his duty, and that presumption throws upon those who impugn his conduct the burden of establishing their charge. This presumption, however, is of much less value than it would appear to be, for at any rate, and under all, or almost all, circumstances, the burden of proof in such actions falls under the rules of pleading upon the plaintiff. Either in his declaration, or his replication to a plea of performance, he must assign breaches and as these are necessarily affirmative propositions, he is bound to support them by adequate proof. In that point of view therefore, the legal presumption of official good conduct is of little worth. The only other questions that can arise on the subject of evidence grow out of such statutory regulations as may have been adopted by the government with reference to the accounts of public officers ; the force and effect as proof of official acts, such as the returns of sheriffs and other officers, and the effect and operation as evidence against a surety, of judgments and other proof that will conclude the principal.

§ 591. Rules of evidence prescribed by statute in actions on official bonds. — Under the act of congress of

March 3, 1797,¹ transcripts from the books of the treasury department are admissible in evidence in actions against collectors on their official bonds, and not only can they be used against the collector, but his surety as well.² If, however, any item of the account did not come into the hands of the officer in the regular course of his official business, the charge of that item, cannot be sustained by the transcript.³ And in cases in which such transcripts are admissible they cannot be contradicted or even explained by the unofficial letters of subordinate officers.⁴ Where the suit is against the sureties only, the transcript of the principal's account is admissible in evidence against them, and the admission of the principal in his returns, of official default, is equally competent.⁵ And so is the statement of the account of a postmaster under the seal of the post-office department,⁶ but in that case and in all actions in which treasury transcripts are put in evidence, such evidence is only *prima facie*, and all mistakes are subject to correction at the instance of either the defendants or the United States, for "errors of computation against the United States are no more vested rights in favor of the sureties than in favor of the principal. All such mistakes * * * may be corrected by a restatement of the account."⁷ And not only are the defendants permitted to prove that the treasury account is incorrectly stated, but they may show also that there are credits which do not appear in the transcript at all.⁸

¹ 1 Stat. at Large, 512.

² United States *v.* Gaußen, 19 Wall. (86 U. S.) 198; United States *v.* Stone, 16 Otto (106 U. S.), 525.

³ Bruce *v.* United States, 17 How. (58 U. S.) 437.

⁴ Strong *v.* United States, 6 Wall. (73 U. S.) 788, 795.

⁵ Chadwick *v.* United States, 3 Fed. Rep. 750.

⁶ Postmaster-General *v.* Rice, Gilpin, 554.

⁷ Soule *v.* United States, 100 U. S. 8; United States *v.* Eckford, 1 How. (42 U. S.) 250.

⁸ United States *v.* Corwin, 1 Bond, 459.

There is still a further rule peculiar to actions on the official bonds of officers acting under the government of the United States, that no set-off or counter-claim is admissible in evidence, no claim for a credit on behalf of the principal in the bond, will be entertained, unless it has been previously offered to the proper auditing and accounting officer of the government and been rejected by him.¹

§ 592. Evidence in action on official bond must show a real substantial legal interest in the beneficiary of the action. — In an action on an official bond it is necessary that the declaration or complaint shall show, and the plaintiff shall prove, that the real plaintiff in interest, the person for whose use the suit is brought, has a real interest in the subject-matter of the action, and has sustained an injury by the alleged breach of the condition. If, therefore, the interest of the beneficiary in the subject-matter of the action is merely equitable, such as where he has an assignment of an execution, he has no legal right to sue, and his action cannot be maintained. The injury must be a legal not an equitable injury.²

§ 593. Presumption in favor of officer — Burden of proof. — There is always a presumption of law that officers perform their duty, and whenever there is a charge made of official default the burden of proof is upon the party making the allegation. If in an action on an official bond the breach laid is the failure of the officer to discharge the duties of his office, by refusing or neglecting to account for and pay over as required by law, money which came to his hands, it is incumbent upon the plaintiff to prove what money did come to his hands, what amount he has not truly accounted for, and in what respects he has failed to do his duty.³

¹ Watkins *v.* United States, 9 Wall. (76 U. S.) 759; 4 Myers' Fed. Dec., §§ 335, 338.

² Hawkins *v.* Commonwealth, 3 A. K. Marsh. 339.

³ United States *v.* Bell, Gilpin, 41.

§ 594. **Burden of proof is upon the party who makes the affirmative proposition — Application of that rule.** — An action on the official bond of a sheriff or other officer may be sustained for the failure of such officer to execute and return process issued to, and received by him before the execution of the bond. And the sureties are liable on the well established principle, that the sureties on the bond in force when the default is committed are liable for it. And if the defense is attempted, that the receipt of the money on the execution took place *before* the execution of the bond, it is incumbent upon those who assert that fact to prove it, for it is a new and affirmative allegation.¹

§ 595. **Return of sheriff — Is only *prima facie* evidence in his favor.** — When a party has a statutory remedy by motion against a sheriff for money made on an execution by sale of property, or otherwise, it is not competent for the officer to escape responsibility in that kind of procedure by merely producing his return. In such a case the plaintiff may go behind the return and prove it to be false, and is not driven to a plenary action for a false return. A sheriff cannot defeat a remedy provided by statute by making his own return conclusive. The rule is well settled that the official return of a sheriff or other executive officer is conclusive evidence against him, but only *prima facie* in his favor.²

§ 596. **Presumption of law in favor of an officer enures to the benefit of his sureties.** — There is a presumption in the absence of evidence to the contrary that every official person discharges the duties incumbent upon him. This principle in proper cases enures to the advantage of sureties in official bonds as well as to that of other persons. Thus, where an action having been brought on a sheriff's

¹ Faulkner *v.* State, 9 Ark. 14.

² Levy *v.* Lawson, 5 Ark. 212.

bond, which by law and its terms was annual, it appeared that the default was committed after the time that the sheriff should have given another bond, it was presumed in the absence of evidence, one way or the other, that the sheriff had done his duty by giving a new bond at the proper time, that he had not assumed to act without warrant of law, and that consequently the sureties on the bond in suit were not liable.¹

§ 597. Sureties bound by the receipt of their principal — Presumption — Official act — Burden of proof. — If notes are placed in the hands of an officer for collection and the usual receipt given, there arises a presumption that they are received by him officially, and the sureties on his bond are liable for the due discharge of his duty with respect to them, and this presumption is in no degree weakened by his omission to append to his signature to his receipt, the letters commonly used to indicate his official character. If it is asserted that the officer received the notes in his individual or private capacity, it devolves on the party making the allegation to prove it.²

When an officer has received a note for collection and given his receipt, and failed either to pay over or account for the money, or to return the note, and a suit is brought against his sureties on his official bond, the burden of proof is upon them to show either that their principal had paid the money to the creditor, or that he had returned the note, or that the debtor was insolvent, so that the money could not be collected. The surety in such case stands in the shoes of his principal, and the receipt of the latter being *prima facie* evidence against him is equally so against the former.³

¹ Hewitt *v.* State, 6 Gill & J. 95.

² Dunton *v.* Doxey, 7 Jones (N. C.), 222.

³ State *v.* Wall, 8 Ired. 11; Wilson *v.* Coffield, 5 Ired. 515; State *v.* Johnson, 7 Ired. 78; 35 Am. Dec. 742.

§ 598. When judgment against principal, *prima facie* and when conclusive upon surety—Various rulings on the subject—Joint bonds.—It is ordinarily a breach of the official bond of a constable or sheriff, to seize the goods of one person upon process directed against another, and if a judgment is obtained against the officer for the tort, it is evidence, either *prima facie* or conclusive, in an action against him and his sureties on his official bond. In *City of Lowell v. Parker*,¹ such a judgment was held to be *prima facie* evidence, but the case did not require that the court should decide whether or not it was conclusive. Such a judgment does not settle whether the officer took the goods by virtue of his office, on that point it is not even *prima facie* evidence; it only settles the amount of the damages and that the officer took the goods wrongfully. On these points it is conclusive against the officer, but as to his sureties different views have been entertained by the courts of different States. In Alabama such a judgment is not competent evidence against sureties at all.² In North Carolina it is *prima facie*, but not conclusive evidence;³ in Pennsylvania it is conclusive as well of the misconduct of the officer, as the amount of the damage sustained by the plaintiff.⁴ In Maine, in a case in which the principal defaulted, the declaration was taken as true against him alone, but the sureties were not held to be precluded by the default from any defense whatever.⁵ And in a later case in the same state, it was competent for the sureties of an administrator to show that a judgment rendered against him was collusive.⁶ But as for that matter, even if a judgment

¹ 10 Metc. 309; 43 Am. Dec. 436.

² *Lucas v. Governor*, 6 Ala. 826.

³ *State v. Woodside*, 7 Ired. L. 296.

⁴ *Masser v. Strickland*, 17 Serg. & R. 354; 17 Am. Dec. 668; *Evans v. Commonwealth*, 8 Watts, 398; 34 Am. Dec. 477.

⁵ *Foxcroft v. Nevens*, 4 Me. 72.

⁶ *Hayes v. Seaver*, 7 Me. 237; *Dawes v. Shed*, 15 Mass. 6; 8 Am. Dec. 80; *Gookin v. Sanborn*, 3 N. H. 491; *Tarbell v. Whiting*, 5 N. H. 63.

were held to be conclusive in every respect, it would still be liable to be impeached and set aside if it could be shown that it was collusive. In Massachusetts a judgment rendered against an officer is evidence against his sureties, and if the bond is joint, the judgment is conclusive, because if the sureties can reopen the question and show that the plaintiff ought not to have recovered the judgment in whole or in part, their defense must enure to the benefit of their principal as well as themselves.¹

§ 599. When, for what purposes, and against whom judgments are evidence. — In an action on a sheriff's bond it is not necessary to aver in the declaration that the chief justice of the county court, (or other equivalent officer) had approved the sureties and administered the oath. Even if this were necessary the omission could only be taken advantage of by demurrer, being a defective statement of title, and not a defective title. When a sheriff has executed his bond with sureties who have been approved, he has done all that the law requires of him, his liability and that of sureties arises from giving the bond, its approval is a mere matter of evidence that the requirements of the law have been complied with. And a judgment by motion against the sheriff for not paying over money, is not evidence against the sureties in an action on the bond. The rule as to judgments as matters of evidence is, that when introduced to prove the facts of their rendition, existence, and legal consequence, they are admissible against every one; but if introduced to prove a fact upon the supposed existence of which they are founded, they may or may not be admissible, according to circumstances. For this purpose they are binding on parties and privies, but no one can be bound by a judgment, unless he be a party to the suit, or in privity with a party, or possess the power of

¹ Tracy v. Goodwin, 5 Allen, 479.

making himself a party. Where a party is not bound by a judgment, it cannot be evidence against him to establish the fact on which it was rendered. Hence, a judgment by motion against a sheriff for not paying over money collected, is not evidence against the sureties on his official bond, to establish the fact on which the judgment was founded, *i.e.* that the money was not paid over.¹

§ 600. Judgment against principal — When and where *prima facie* evidence against surety. — Although the authorities are not uniform, the better opinion is that a judgment against the principal in an official bond is *prima facie* evidence against the sureties. “When one is responsible by force of law or by contract for the faithful performance of the duty of another, a judgment against that other for the failure in the performance of such duty, if not conclusive, is *prima facie* evidence in a suit against the party so responsible for that other. If it can be made to appear that such judgment was obtained by fraud or collusion it will be wholly set aside. But otherwise it is *prima facie* evidence.” The defense of a surety may be fraud or collusion in obtaining the judgment, or payment or mistake in the amount. And as a surety may claim the benefit of a judgment in favor of his principal, so he may reasonably be concluded by a judgment against him, unless he can show facts which exonerate him.²

§ 601. When and where a judgment against principal is conclusive against surety. — On the other hand, it is held in a California case that where a surety undertakes for his principal that he shall do a particular act to be ascer-

¹ Carmichael *v.* Governor, 3 How. (4 Miss.) 236.

² Charles *v.* Hoskins, 14 Iowa, 472; City of Lowell *v.* Parker, 10 Metc. 309; 43 Am. Dec. 436; McLaughlin *v.* Bank of Potomac, 7 How. (48 U. S.) 220; Masser *v.* Strickland, 17 Serg. & R. 354; 17 Am. Dec. 688; Evans *v.* Commonwealth, 7 Penn. St. 265; Drummond *v.* Prestman, 12 Wheat. (25 U. S.) 515; Bergen *v.* Williams, 4 McLean, 125.

tained in a specified manner, as that he shall pay a judgment, then the judgment against the principal is conclusive upon the surety. This rule, however, rests upon the terms of the contract. In the case of official bonds, however, the court holds that sureties have a right to contest with the plaintiff the question of their liability, for if they are debarred from this contestation it is because their obligation can be construed to be that they will answer judgments rendered against him, not that they will be responsible for his official conduct, the latter being the plain intent and meaning of the bond. The court concludes that a judgment against the principal in an official bond, if evidence at all against the sureties, must be conclusive in the absence of fraud or collusion; but that unless the sureties were parties to the record, it is not admissible at all as evidence against them.¹

§ 602. When testimony of principal obligor is competent under the old rules disqualifying witnesses on account of interest — *Res gestæ*. — Irrespective of modern rules of evidence abolishing incompetency on account of interest, the sheriff could testify to charge one set of his sureties with liability for his official defaults, and to discharge another. He had really no interest, being himself liable in any event. His declarations, too, made while acting officially in relation to the receipt of money, form a part of the *res gestæ*, and are admissible as a part of the act and explanatory of it; but if made when he is not transacting official business, or in contemplation of such business to be performed, they are not admissible.²

¹ *Pico v. Webster*, 14 Cal. 202; *Wain v. Gold*, 5 Pick. 480; *Lincoln v. Blanchard*, 17 Vt. 464; *McKellar v. Barrett*, 4 Hawks (N. C.), 31; *Moss v. McCullough*, 5 Hill (N. Y.), 181; *Douglass v. Howland*, 24 Wend. 35; *Jackson v. Griswold*, 4 Hill (N. Y.), 522; *Carmichael v. The Governor*, 3 How. (Miss.) 236; *Lucas v. The Governor*, 6 Ala. 826.

² *Dumas v. Patterson*, 9 Ala. 486; *Bondurant v. Bank, etc.*, 7 Ala. 830.

§ 603. When evidence must support unnecessary allegation in declaration or complaint. — If in an action on an official bond the plaintiff alleges in his declaration that the officer *collected* the money, he is bound to prove it, as by his election he has made it material, and a plea traversing the allegation is a good answer and should not be stricken out. And to charge the officer with such liability it is necessary to produce the best evidence, which is not the auditor's certificate, but the officer's receipt. The rule that the best evidence, must be produced is of universal application, for secondary evidence is not admissible unless the higher grade cannot be produced, and even then, it cannot be introduced unless a proper ground be laid for its admission by showing the loss or destruction of the best testimony.¹

§ 604. Summary judgment against principal is *prima facie* evidence against surety. — In an action against the sureties on the official bond of a sheriff, the official settlement of the officer with the county court by which is ascertained the amount of the county levies in his hands, is *prima facie* evidence against them, and the record of a judgment by motion against the sheriff, for the balance in his hands found on such settlement is admissible in evidence. And where a statute gives a special remedy against an officer, or his sureties, the fact that there had been a judgment against one does not preclude an action against the other.²

§ 605. Official accounting of principal *prima facie* evidence against surety. — When a public officer, as for example a clerk of a court, makes a report of his proceedings to the auditor of the state, and therein sets forth the state of his accounts with the state and the balance against him, such report is *prima facie* evidence against his sureties on his official bond, and this is true, although the report

¹ Taylor *v.* Auditor, 4 Ark. 574; S. P. Taylor *v.* Pulaski County, 4 Ark. 596.

² Grayham *v.* County Court, etc., 9 Dana, 182.

which should have been made by him during his term of office had been deferred until after its expiration.¹

§ 606. Record of an amerciament is not evidence of breach of their bond, against sureties. — The record of an amerciament against a sheriff is admissible in evidence against his sureties to prove the fact of the amerciament, itself, it is not evidence, however, of the breach of the bond for which the amerciament was imposed. The sureties are entitled to controvert their liability, and the fact of such breach, by any evidence in their power. They cannot, however, avail themselves of the objection that the amerciament was imposed after the expiration of the term for which they were liable, provided the breach occurred during the term.²

§ 607. Receipt of deputy evidence against sureties of principal. — The receipt of a deputy sheriff of claims put into his hands for collection, is evidence as well against the sureties of the sheriff as the sheriff himself. Indeed, the receipt of the deputy being the act of an agent is in law the receipt of his principal, the sheriff himself, and being *his* act the sureties are bound by it, so far as it tends to show a breach of their undertaking for the sheriff. It is competent evidence against the sheriff, and admissible, but not conclusive against the sureties.³

§ 608. Rule absolute against sheriff in Georgia is only *prima facie* against his sureties. — When a rule has been made absolute against a sheriff, it is conclusive against him, in a subsequent action upon his official bond, against him and his sureties ; but as to them the rule is only *prima facie* and presumptive evidence, and they are permitted to make any defense in that action which the sheriff could have produced

¹ Rhodes *v.* Commonwealth, 6 B. Mon. 359, 362.

² Governor *v.* Montford, 1 Ired. 155; See, also, State *v.* Woodside, 7 Ired. 296.

³ State *v.* McGee, 7 Ired. L. 377; State *v.* Allen, 5 Ired. 36. See, also, State *v.* Fullenweider, 4 Ired. 364.

upon the hearing of the rule. But neither the sheriff nor his sureties will be permitted to show in answer to a charge of neglecting or refusing to levy an execution on the property of a defendant, that he was insolvent, or that there were outstanding liens on his property more than sufficient to cover its value. The sheriff being a ministerial officer is not entitled to judge in such a case, it is his duty to find out what property the defendant has and levy upon it.¹

§ 609. What is a sufficient production in evidence of a paper (of which profert has been made), which is matter of record. — In an action on an official bond, the original of which is by law to be deposited in a public office, and become a matter of record, it is a sufficient fulfillment of the profert of the instrument to produce a duly certified office copy. The original instrument not being within the control of the plaintiff, he could not be expected or required to produce it.²

§ 610. What is competent and sufficient evidence in an action on a deputy's bond. — In an action by a sheriff against his deputy on his official bond, for indemnity against loss caused by a fine imposed upon the sheriff for the deputy's default, in not returning an execution in due season, it is sufficient evidence to support the charge that the files and minutes of the court imposing the fine were produced. In such a case it is not necessary to show the regularity of the proceeding, especially where the deputy had notice of the proceeding in which the fine was imposed, and had furnished affidavits in opposition to the rule.³

§ 611. Same subject continued — Notice to sureties. — In an action by a sheriff against his deputy on the official bond of the deputy and his sureties, founded on a judgment rendered against the sheriff for the misfeasance of the

Crawford v. Word, 7 Ga. 445.

² *Young v. State*, 7 Gill & J. 253, 259.

³ *Hull v. Luther*, 13 Wend. 491.

deputy, the record of that judgment is *prima facie* evidence, as well against the surety as against the deputy. Indeed, as to the latter, if he had full notice of the pendency of the action against the sheriff, and an opportunity to defend the suit, the judgment would be conclusive of the deputy's liability to the sheriff for the full amount of the judgment. As to notice to the sureties; the rule is laid down in a New York case, following another leading case thus: "It is objected that this judgment was not admissible, because the sureties were not notified and, therefore, it was *res inter alios acta*. But we think this objection cannot be supported under the circumstances of this case. When one is responsible by force of law or by contract, for the faithful performance of the duty of another, a judgment against that other for a failure in the performance of such duty, if not conclusive is *prima facie* evidence in a suit against the party so responsible for that other."¹

§ 612. Penalty or liquidated damages is a question of evidence for the court — Rule as to evidence in such case. — Whether the amount agreed by a bond to be paid, forfeited, or lost is a penalty or liquidated damages is a question which can rarely occur in reference to a strictly official bond. The penalties of those bonds are almost invariably *penalties*, strictly so-called, but in many less regular instruments, which, nevertheless, are bonds upon condition the question may very well arise. Whenever it does, the rule is that while the construction of the bond is matter of law for the court, and not matter of fact for the referee, it is

¹ *Westervelt v. Smith*, 2 Duer (N. Y.), 449, 460; *Bartlett v. Campbell*, 1 Wend. 50; *Drummond v. Preston*, 12 Wheat. (25 U. S.) 515; *Lee v. Clark*, 1 Hill (N. Y.), 56; *Duffield v. Scott*, 3 Term 374; *Franklin v. Hunt*, 2 Hill (N. Y.), 671; *Lewis v. Knox*, 2 Bibb, 453; *Atkins v. Bailey*, 9 Yerg. 111; *Tyler v. Ulmer*, 12 Mass. 164; *Mott v. Key*, 10 Johns. 478; *City of Lowell v. Parker*, 10 Metc. 309; 43 Am. Dec. 436; *Train v. Gould*, 5 Pick. 380; *Gilbert v. Wiman*, 1 N. Y. 550. See, also, *Chase v. Hinman*, 8 Wend. 452; *Warwick v. Richardson*, 10 Mees. & Wels. 284. See, also, on same point *Thomas v. Hubbell*, 18 Barb. 9.

to be determined like a question of fact by the weight of the competent evidence contained in the bond and other writings, and not by any technical rule of law.¹ Thus, in the first cited case, H. gave a bond for \$4,000 conditional to be void if he should within a limited time erect a hotel to cost \$40,000 on certain land then recently purchased. "All the writings considered together," the court said, "show a gift of \$4,000 made by the defendants to H., to be repaid to them if he did not perform the condition of the bond,² and prove that the parties intended to make \$4,000 the amount of liquidated damages.

§ 613. Evidence of character of principal in official bond inadmissible. — Although in criminal cases it is competent for the accused to give evidence of his good character, that privilege is denied to the defendant in civil cases.³ And the rule is not relaxed when the person whose good character is sought to be established is not the defendant, but another person who is dead.⁴ The reason of this rule is that the evidence must apply to the particular facts in dispute, and what they are must be ascertained by their own circumstances, and not by the character of the parties engaged in the transaction. Hence it has been held that evidence of the character and business habits of a paymaster who was dead, could not be admitted in an action against his sureties on his official bond.⁵

¹ *Houghton v. Pattee*, 58 N. H. 326; *Rice v. Society, etc.*, 56 N. H. 191, 203.

² See *Chase v. Allen*, 13 Gray 42.

³ *Fowler v. Aetna, etc., Co.*, 6 Cowan, 675; *Gough v. St. John*, 16 Wend. 646; *Attorney-General v. Bowman*, 2 Bos. & P. 532; *Humphrey v. Humphrey*, 7 Conn. 116.

⁴ *Nash v. Gilkeson*, 5 Serg. & R. 352; *Anderson v. Long*, 10 Serg. & R. 57; *Givens v. Bradley*, 3 Bibb, 195; 6 Am. Dec. 646.

⁵ *United States v. Wood*, 13 Blatch. C. C. 252; *s. c.*, 4 Myers' Fed. Dec., 2282.

CHAPTER XIX.

GENERAL LIABILITY OF SURETIES ON OFFICIAL BONDS.

PART I.

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648. Same subject continued.
649. Same subject continued.
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§ 620. **General liabilities of sureties.** — The contracts into which sureties enter are not founded upon any valuable consideration passing to them from the obligee. The legal consideration is vicarious, they bind themselves because some benefit will be thereby obtained by their principal, and in most instances the inducement to such obligation is of a moral nature, personal friendship, family relationship, and other circumstances of that character. They may lose and cannot gain by the event of the undertaking. Hence they are regarded by the law with favor and indulgence, which has been formulated into the maxim that the liability of sureties is *strictissimi juris*. They are held to be bound as far as they distinctly bind themselves, but their responsibility cannot be extended by construction beyond the terms of their agreement. Those terms, however, must be subjected to a reasonable construction, and that construction is, that the surety, is responsible for everything expressed in the instrument he has signed, and whatever else may fairly be implied from the words that are used therein.

§ 621. **Liability of surety when his principal holds over after expiration of his term.** — The question whether a surety on an official bond continues liable is often presented in cases in which the principal holds over after the expiration of his term, either with the sanction of the law, as when by statute he is empowered to exercise the functions of his office until his successor shall be elected and qualified, or, without that authority as contesting the election of his successor, or for other reasons. Whatever may be the ground upon which the claim to the office may be founded,

or the liability incurred, the continuance of his surety's responsibility is a matter of no little importance, and there have been many adjudications upon different phases and presentations of the question.

The oldest case in which the liability of sureties in this connection is construed, is that of a deputy postmaster in England appointed for the term of six months (the term being recited in the bond), and the condition of the bond was for the good behavior of the incumbent "during all the time that he, the said Thomas Jenkins, shall continue deputy postmaster." It was held that the surety was not responsible for anything that took place after the expiration of the six months, and that the words "during all the time," etc., related only to that period.¹

§ 622. Same subject continued — English rulings upon it. — This case has been generally followed in England. In a much later case,² the same conclusion was reached, the condition of the bond being "that if the said E. B. Julian do and shall, from time to time, and at all times, so long as he shall hold the said office or employment, duly, faithfully, and punctually account for," etc. The term of the appointment was for twelve months, but that did not appear in the bond. Lord Campbell said: "Where there is a recital in the bond of the limited time for which the principal is appointed, there is a number of express decisions, that the surety is no longer liable; and they seem to show that where the term of appointment is not recited, it may be stated by averments in the pleading what the limitation of the appointment was." And he proceeds to hold that a surety is relieved as well where the term of the appointment is averred in the pleading, as where it is recited in the condition.³

¹ *Lord Arlington v. Merrick*, 2 Saund. 403.

² *Kitson v. Julian*, 30 Eng. Law & Eq. 326.

³ See, on this subject, the following English cases: *Hassall v. Long*, 2 Maule & Sel. 363; *Liverpool Waterworks v. Atkinson*, 6 East, 507; *Peppen v. Cooper*, 2 Barn. & Ald. 431.

§ 623. **Same subject continued — American rulings upon it — Alabama ruling.** — The American authorities are generally in accord with the English doctrine. In a very well considered and recent case in Alabama, all the authorities are reviewed,¹ and the court holds that the liability of a clerk's sureties ceases with the expiration of his prescribed term of office, although the charter of the city creating the office provides that upon the expiration of his term he shall continue in office, “until his successor is duly elected and qualified;” and that these words are only designed to cover the reasonable interval that may elapse between the expiration of a term and the induction of the successor, and cannot, *quoad* sureties, indefinitely prolong a liability entered into for a term distinctly prescribed and limited as well by the law, as the language of the bond.

§ 624. **Same subject continued — New Jersey rulings.** — The language of the supreme court of New Jersey in a like case, also very recent, is to the same effect. The court says: “Where, as in this case, the office is filled by an annual appointment under the constitution and by-laws of the association, a bond given with the condition for the due execution of the duties appertaining to the office, during the time the appointee shall continue in office, will be limited in its construction to the annual term. To enlarge the responsibility of sureties in the bond, there must be express words in the condition extending the time beyond the fixed term of the office. It is not enough that the recital should be, so long as he shall continue in office, or until a successor shall be appointed; if the office is annual or limited, the surety will not be prejudiced by a failure to appoint according to the law, or rule which regulates such appointment. His intention to assume a further and continuing liability must be found in the words of the bond. It is not a matter for inference, but for exposition. The

¹ *Montgomery (City) v. Hughes*, 65 Ala. 201.

surety is only bound according to the words, and the intention expressed in the bond."¹ But if the condition of the bond is, "during the time he shall continue in the said office, whether of the present term * * * or of any succeeding terms," etc., the liability of the surety is manifestly continuous, and lasts as long as the principal may hold the office.²

§ 625. Same subject continued — Massachusetts rulings. — The rule on this subject is well expressed in a Massachusetts case. "But some time must elapse after the re-election, to enable the officer elect to express his acceptance, and some further time, if giving bond is a necessary qualification, to enable him to procure the execution of the bond. The law having directed that such officer shall be chosen annually, it assumes and presupposes that such directions will be complied with, and then the words in question must be construed to mean till the next annual meeting at which such election is to be made, and such reasonable time thereafter as shall be sufficient to enable the officer elect to procure and deliver his bond, or if he fails to qualify, until the corporation can elect another and cause him to be qualified."³

This is believed to be the rule most consonant with the principles of law and the immunities accorded to securities. It is true that perhaps under the tenor of their bonds (the law in force providing that their principals shall hold until their successors are qualified, being regarded as part of their contract), they might be held to a further and in-

¹ People's, etc., Association *v.* Wroth, 42 N. J. L. 70; Mayor, etc., *v.* Crowell (11 Vroom), 40 N. J. L. 207; Citizens', etc., Association *v.* Nugent (11 Vroom), 40 N. J. L. 215; Chelmsford, etc., Co. *v.* Demarest, 7 Gray 1; Trustees, etc., *v.* Dean, 130 Mass. 242.

² People's, etc., Association *v.* Wroth, *supra*; Angero *v.* Keen, 1 Mees. & W. 390; Oswald *v.* Mayor of Berwick, 1 E. & B. 295 *s. c.*, 3 E. & B. 653 *s. c.*, 5 H. of Lords Cases, 856.

³ Chelmsford Co. *v.* Demarest, 7 Gray, 1; Harris *v.* Babbit, 4 Dillon, 185, and cases cited; State *v.* Kurtzeboom, 9 Mo. App. 245.

definite responsibility, but that construction is not consistent with equity, nor the nature of their undertaking which is distinct and definite. The same law which requires the officer to hold until his successor shall be elected and qualified, requires also that such successor *shall be* elected and qualified within a reasonable time after the expiration of the first officer's term, and *that law* also forms part of the surety's contract. To fix upon the surety therefore a liability, indefinite in duration, caused by the *laches* and neglect of duty of other officers would be manifestly inequitable.

A surety, for example, guarantees the good conduct of his principal for a single term, say two years, he has a right to presume that the proper officers will do their duty, that the law providing for the election of the successor will be complied with and his jeopardy terminated at the expiration of that term, or within a reasonable time thereafter. And if a bond by its terms guarantees the good conduct of the principal during a prescribed term, and until "the said association or the directors thereof should elect another treasurer"; and upon the expiration of the term, the principal in the bond is re-elected, the bond does not bind the sureties for the second term, and cannot be construed to extend their liability as long as the appointing or electing power chooses to avail itself of the services of the principal, and until, literally, *another treasurer*" shall have been elected.¹ "The rule," the court says, is "that a contract of this kind will not be extended against the surety beyond the official term to which it primarily relates, except from the urgency of a plain expression of such an intent."²

§ 626. Same subject continued — Ruling in Iowa. — In Iowa, as in other states, the question, whether sureties are

¹ *Citizens' Loan Association v. Nugent*, 40 N. J. L. 215. See, also, *Amherst Bank v. Root*, 2 Metc. 536; *Welch v. Seymour*, 28 Conn. 337; *Connors v. Greenwood*, 1 Dessa. 452.

² *Citizens' Loan Association v. Nugent*, 40 N. J. L. 215.

liable for a holding over officer, has been adjudicated. It was there decided in a case in which the county treasurer, whose term of office was fixed by law at two years, held over after being re-elected, but gave no new bond and took no new oath, that the sureties upon his first bond were not responsible for his acts during the second term. The court says: “The words ‘and until his successor is elected and qualified,’ are intended to cover the time between the election and qualification. This time prescribed for a successor to prepare himself to enter upon his office, is the limit of the sureties’ responsibilities, and if the former does not perform this duty there is a vacancy, and there should be an appointment. That liability cannot be extended over another term by the omission of these requirements. The law gives the office a term of two years. The surety knew this and takes the responsibility with a view to it.”¹

§ 627. Same subject continued — Virginia ruling. — In Virginia it was held in an old case of this character that the expression in the bond “during the continuance in office,” has reference only to the actual duration of the office, by virtue of the appointment under which the bond was taken.² There is, however, in the same state, a later ruling, which, under somewhat peculiar circumstances would seem to indicate a contrary doctrine. The constitution of the state required that all officers shall continue to discharge the duties of their offices, after their terms of service have expired, until their successors are qualified. The legislature in March enacted that sheriffs elected in May should qualify in the succeeding January instead of July, as prescribed by the antecedent law. A sheriff whose term expired on the first of July next after the passage of the March statute, continued to act as sheriff from July until the follow-

¹ County of Wapello *v.* Bigham, 10 Iowa, 39, 43.

² Commonwealth *v.* Fairfax, 4 Hen. & M. 208. See, also, Tyler *v.* Nelson, 14 Gratt. 214.

ing January, and during that time collected taxes, and made default. The question was whether the sureties of the sheriff were liable for that default. The court held that the term of office of the sheriff was from July 1, 1854, to July 1, 1856, but was prolonged by the operation of the constitutional provision until January 1, 1857, when his successor was qualified, and, therefore, as the sureties were bound by the terms of their bond for their principal's official acts while he was in office, they were responsible for his defaults between July and January.¹

§ 628. Same subject continued — Contrary rulings in other states — Indiana. — There is, however, a line of decisions in other states which controverts the doctrine of Chief Justice Shaw just quoted.² In Indiana the court says: “The sureties on his bond were bound to know that his right to the office might extend beyond the year, and they bound themselves as his sureties for whatever time he might continue in the office by virtue of the election.”³ This case follows an older decision in the same state, in which it is held that under an official bond by which the obligors are bound in terms for the due discharge of his duty by the principal obligor, for one year, and until his successor “shall be elected and qualified,” the sureties are bound for the acts of their principal as long as he holds over, he having been elected his own successor, and continuing to act, although without qualifying or giving a new bond.⁴

§ 629. Same subject continued — Mississippi and California rulings. — In Mississippi, an officer appointed for a term of two years and until his successor is appointed, may legally exercise his functions after the expiration of his two years, no successor having been appointed; and his sureties

¹ Commonwealth *v.* Drewry, 15 Gratt. 1, 9.

² Chelmsford, etc., Co. *v.* Demarest, 7 Gray, 1.

³ State ex rel. *v.* Berg, 50 Ind. 496, 502.

⁴ Butler *v.* State, 20 Ind. 169.

on his official bond executed at the beginning of his term are responsible for his acts fifteen or eighteen months after its expiration. The court says: "It is clear that the bond covers the time for which the officer is authorized to act by the law under which he holds his office, and that the period of responsibility is determined by the law."¹ And in California, the same rule has been adopted, the court holding that the liability of the surety continues as long as their principal is a *de facto* officer.²

§ 630. Same subject continued—Missouri ruling.—In Missouri, the rule seems to be well settled that the term of an officer does not expire until his successor has been qualified, and his sureties are, as fully liable for the acts of their principal, done after the expiration of his stated term and before the induction of his successor, as for any other acts done during the period of his service. "The time during which he holds, after that specified time has expired and until a successor is elected and qualified is as much a part of his term of office as the preceding time."³ The court holds in all the cases that the statutory provisions that an officer holds until his successor has been elected and qualified, enters into and form a part of the contract of the surety. "The provisions of the law just cited are to all intents and purposes as much part and parcel of the bond as if so nominated therein."⁴

§ 631. Sureties liable for the discharge by their principal of duties incumbent on him after the expiration of

¹ Thompson *v.* The State, 37 Miss. 581, 522. See also, South Carolina Society *v.* Johnson, 1 McCord, 41; 10 Am. Dec. 644; South Carolina, etc., Co. *v.* Smith, 2 Hill (S. C.), 589; McAfee *v.* Russell, 29 Miss. 84.

² Placer County *v.* Dickerson, 45 Cal. 12.

³ State *v.* Kurtzeborn, 78 Mo. 98; Long *v.* Seay, 72 Mo. 648; Savings Bank *v.* Hunt, 72 Mo. 597; State *v.* Lusk, 18 Mo. 333; State *v.* The Auditor, 38 Mo. 193.

⁴ State *v.* Kurtzeborn, 78 Mo. 98.

his term. — It is a good general rule that the liability of sureties on an official bond is co-extensive with the duty which the law requires of the principal. They are responsible for his due performance of all those duties, even of such as it may be incumbent upon him to perform after the expiration of his term of office. Thus, if the bond of a sheriff binds its obligors for the discharge by the officer of his duties, "during said term of three years," they are liable for his failure to perform such of those duties as the law requires him to discharge after the expiration of said term. The word "during," in this connection, means "incident to;" *i.e.*, incident to his "said term of three years."¹

§ 632. Sureties liable for all the acts of their principal while he officiates, if his bond is a continuing bond. — If an officer is appointed to hold during the pleasure of the directors of a corporation, and those directors are annual officers, it does not follow that he is an annual officer also. He continues to hold under and during the pleasure of the directors succeeding those who appointed him, and under their successors also. His office being thus a continuing office, terminable only by his removal, his bond is a continuing bond, and the liability of his sureties lasts as long as he is in office. A bond conditioned that the principal should faithfully discharge his duty as "long as he should continue in his said office," is in force until he has been removed.²

§ 633. Old sureties and new. — The transition from one official to another, and in a less degree the change of terms of the same officer are the critical periods for the sureties on official bonds. The deficit, if any, usually makes its ap-

¹ *Baker v. Baldwin*, 48 Conn. 181.

² *Commonwealth v. Reading, etc., Bank*, 129 Mass. 73. See, also, *Dedham Bank v. Chickering*, 3 Pick. 835; *Chelmsford Co. v. Demarest*, 7 Gray, 1; *Amherst Bank v. Root*, 2 Metc. 528; *Cambridge v Fifield*, 126 Mass. 428.

pearance at these times. It is, therefore, a matter of some interest to consider the liability of the sureties of a re-elected or re-appointed officer, whether, at the close of the first and beginning of the second term, the old sureties, or the new, are liable for the funds then on hand. Of course, the question must depend, in a great measure, upon the terms used in the bonds themselves. A second bond conditioned for the faithful accounting, etc., of all moneys which have come to the principal's hands *during the term* includes all money which may remain in his hands from his preceding term, provided (it may be presumed) he was in no default with reference to such funds.¹

If the officer has been re-elected or re-appointed, and had committed defaults during his prior term, his sureties on his bond for that term are responsible therefor, and not those who become responsible for his good conduct during his subsequent term.² Their liability attaches, or relates back to, the beginning of the term and includes all money *then* on hand, and whatever may thereafter come to the hands of the officer. And as a matter of evidence relating to such liability, the reports of the principal as to the amount of money on hand, are not conclusive against the sureties, but are mere admissions of the principal liable to explanation by the surety.³

§ 634. Same subject continued — When a second default occurs after the first has been made good. — If the principal in an official bond, or other bond upon condition, receives money, and while his first bond is operative, converts it to his own use, of course his sureties upon that

¹ *De Hart v. Maguire*, 10 Philad. 359.

² *Bissell v. Saxton*, 66 N. Y. 55; *Meyers v. United States*, 1 McLean 493; *Farrar v. United States*, 5 Pet. (30 U. S.) 372, 389; *United States v. Boyd* 15 Pet. (40 U. S.) 187; *s. c.*, 5 How. (46 U. S.) 50; *Vivian v. Qtis*, 24 Wis. 518; *s. c.*, 1 Am. R. 199.

³ *Bissell v. Saxton, supra*; *United States v. Boyd*, 5 How. (46 U. S.) 50.

bond would be liable for the amount so converted if an action had been seasonably brought to enforce their liability. If, after a second bond has been given, he replaces that money and for a time holds it upon the trust declared by the bond, and afterwards again converts the fund to his own use, his sureties upon his second bond are responsible for the second conversion. If, at any time, between the execution of the second bond and the second defalcation he was "in line," holding upon the specified trust, funds adequate to answer the requirements of his bond, it was manifestly the duty of his bondsmen to keep him so, and they are liable for the loss sustained by the beneficiary if they fail to do so.¹ And in a somewhat later case in the same state it was decided that when upon the expiration of an officer's term of office, moneys previously received by him remain in his hands, and he, having been re-elected, enters upon another term, his sureties upon the bond for that second term, are liable for any defalcation that may take place during his second term. If he failed to pay over to himself as successor, the moneys on hand at the period of the transition from the first to the second term, or, in other words, if the default occurred during his first term, the securities on his first bond are responsible, but, if he makes good that defalcation, and again defaults during his second term his sureties on his second bond are liable. The sureties in such case are at liberty to show *when* the defalcation occurred, and are not estopped by the acts, books, entries, or reports of their principal, from showing the true date of the default.²

§ 635. The time when sureties become liable — Test as between first and second bonds. — The liability of sureties upon an official bond is incurred when the default

¹ Parker *v.* Medsker, 80 Ind. 155.

² Goodwine *v.* State, 81 Ind. 109. See, also, Cook *v.* State, 13 Ind. 154, 159.

takes place, and this is the test in solving the questions frequently arising between different sets of sureties, when the same person is re-elected or re-appointed. And in applying this test, the necessity of a demand for money in the hands of an officer frequently becomes a vital question. Thus, where money in the hands of a master in chancery was ordered by the court to be paid to the persons entitled thereto, and no demand was made for it until after the expiration of his first term of office, and the beginning of his second term, it was held that the sureties for his second term were responsible for the money, because under their bond, they were liable for his failure to pay over money in his hands, and no demand having been made during his first term, he was under no obligation to pay during that term, and therefore was guilty of no default.¹

§ 636. Sureties liable for money officially in the hands of their principal when their bond went into operation — Burden of proof. — Sureties on an official bond are liable for moneys in the hands of their principal at the date of the bond, provided such money forms a part of the fund which the bond was intended to secure, and came to the hands of the principal obligor in the course of a precedent term of office or employment. If they make the defense that the money was collected, or otherwise came into the hands of their principal before the execution of the bond, it is incumbent upon them to show also that it was *misapplied* before that time.²

§ 637. Successive bonds — Receipts under second bond cannot be used to cover defalcations under the first. — The rule is very firmly established that the sureties upon the bond in force when the default took place, are liable for

¹ *People v. Shannon*, 10 Ill. App. 355; *People v. Shannon*, 10 Ill. App. 364.

² *Helton v. Lane*, 43 Tex. 279.

that default. It is not competent, therefore, for the superior officials to disregard this obvious rule of justice, and cover the defalcations of one year by appropriations from funds collected during a subsequent year. Thus, where a tax collector, in 1854, was a defaulter, and continued to act in 1855 and 1856 under different bonds with different sureties, and the selectmen, his superiors, appropriated from moneys received on the assessments of 1855 and 1856 sufficient to balance the deficiency of 1854, the appropriation was held to be manifestly inequitable, and the sureties of 1855 and 1856 were protected from such gross injustice.¹

§ 638. Successive sureties — Additional and substitute bonds — Liability of sureties upon them. — When, upon the application of the sureties of public officers under state statutes, they are released from their liability and new bonds are given, it is obviously the law that the release of the sureties does not operate upon a liability incurred before the date of the release. And it is equally true that the sureties upon new bonds given after such release are responsible only for liabilities incurred, or defaults committed *after* the execution of such new bonds. Unless by the terms of new bonds or the statutes exacting them, they are required to be retrospective in their operation, the sureties are liable for nothing antecedent to the date of their obligation. There is, however, in some cases a difficulty in fixing the precise time when the liability of sureties for a particular transaction takes effect. If it is the duty of the officer who has received money to hold it until it is drawn out of his hands by the orders of his superiors, or upon demand, and he holds such funds until the liability of the first set of sureties has expired, and until that of the second has accrued, and has the money in hand at the transition period, and has

¹ *Porter v. Stanley*, 47 Me. 515.

committed no default, nor failed in his duty prior to that time; in such case it is manifest that after the transition period, the money is at the risk of the second or substitute set of sureties. If, however, having received money, it is the duty of the officer to pay it promptly, or at a stated time before the transition period, or within a reasonable time after its receipt, and he fails to do so, and is therefore legally in default when the transition takes place, the liability is clearly upon the first set of sureties. The liability of the sureties is, therefore, in a great measure controlled by the nature of the office, whether the officer is a treasurer, and his duty the *quasi* permanent custody of funds, or whether the receipt and disbursement of money is only incidental to the office, transient and temporary. In the case of a justice of the peace in Iowa, whose duty it was, in the language of his bond, "to pay over to the officer or person entitled thereto all money which may come into his hands by virtue of his office;" it was held that for money received during the currency of a prior bond, the sureties in a substituted bond were not liable, the court regarding as the test of liability the time when the money was received by the justice, not the time when the payment was demanded and refused.¹

§ 639. Same subject continued. — In an Alabama case in which there had been a renewal of a sheriff's bond, it was shown that the money in question had been received by the sheriff during the currency of his first bond, but converted during that of his second bond. The court says: "All reasonable presumptions favorable to a performance of official duty are indulged, and it cannot be inferred from

¹ *Thompson v. Dickerson*, 22 Iowa, 360; *Mahaske v. Ingalls*, 16 Iowa, 81; *Bessinger v. Dickerson*, 20 Iowa, 260; *Myers v. United States*, 1 McLean C.C. 493; *Farrar v. United States*, 5 Pet. (30 U.S.) 373'; *Bigelow v. Bridge*, 8 Mass. 275; *Warren Co. v. Ward*, 21 Iowa, 84; *Miller v. Stewart*, 9 Wheat. (22 U.S.) 681; *United States v. Giles*, 9 Cranch (18 U.S.), 212.

the mere receipt of money on an execution by a sheriff, that he had converted it. If it had been shown that previous to the execution of the bond in suit, the principal of the defendants had appropriated the amount collected by him, then the first set of sureties only would have been liable. But the proof does not show such to be the predicament of this case; the liability to an action does not appear to have been fixed until after the renewed bond was prosecuted.” And upon this the court held the new sureties liable.¹ There have been numerous and various rulings on this subject, the discrepancies between them being caused by differences in the conditions of the bonds adjudicated, and in the provisions of the statutes by which the bonds are required. The general principle, however, which underlies all the cases, is, that that surety is liable for the default, during the currency of whose bond it occurred, that it is the breach of duty which fixes the responsibility, and not the receipt of the money. Thus, if an execution remain in the hands of a sheriff at the expiration of his term, he being his own successor, his sureties on his new bond are responsible for his subsequent neglect to collect the money.² The rule is that they who were sureties where the officer failed to perform the duty incumbent upon him are answerable for the consequences.³

§ 640. When liability for money is incurred by first surety; when it is transferred to second. — The precise time when the liability of the sureties of an officer attaches, is often made a question. It has, however, been held, with manifest reason, that when an officer receives public money his sureties become immediately responsible for it, and that liability continues until he has legally disbursed it. The

¹ Governor *v.* Robbins, 7 Ala. 79; Dumas *v.* Patterson, 9 Ala. 484.

² State *v.* Roberts, 12 N. “J. L. 117.

³ People *v.* King, 15 Wend. 623; People *v.* Ten Eyck, 13 Wend. 448; Fitts *v.* Hawkins, 2 Hawks, 394.

time when payment may be demanded is immaterial in fixing his liability ; the demand, if not complied with, is only evidence of a default, and of a breach of the bond.¹ If an officer re-elected, gives a new bond, the liability of the old sureties is transferred to the new, unless it can be shown that a conversion or breach of the bond occurred before the new bond was given. New securities are not responsible for prior defalcations unless the conditions of the new bond shall embrace them.²

§ 641. The liability of sureties on the bond then in force is made absolute by the default or misfeasance. — The liability of an officer's sureties on his bond is fixed by the time at which the default occurs, and a right of action accrues. When a sheriff has collected money no liability to an action is thereby fixed upon his sureties. That is done when he fails to pay on demand, or at the proper time, or to the proper person, and when that default occurs, the sureties on the bond then in force are liable. As already said the neglect of a sheriff to execute process in his hands when his first term expires, is a breach of his bond given to secure the discharge of his duties during his second term.³

§ 642. Same subject continued — Rule in Missouri — When an officer is his own successor. — It is a general rule that a sheriff going out of office can finish, after his term expires, all the business that he had begun but not completed when the transition took place. In some of the states the rule remains as at common law, in others it has been modified by statute, in a few it has been abrogated.

¹ *Freeholders, etc., v. Wilson*, 16 N. J. L. 110, 117.

² *Myers v. United States*, 1 McLean C. C. 493.

³ *Governor v. Robbins*, 7 Ala. 79. See, also, *State v. Roberts*, (7 Halst.) 12 N. J. L. 114, 21 Am. Dec. 12; *People v. King*, 15 Wend. 623; *People v. Ten Eyck*, 13 Wend. 448; *Fitts v. Hawkins*, 2 Hawks, 894; *Treasurer v. Taylor, 2 Bailey*, 524.

It is also a rule that upon the re-election or re-appointment of an officer, his sureties upon his new bond become responsible for all moneys then lawfully and officially in the hands of their principal. This being the law, the question has sometimes arisen whether the second sureties of a re-elected sheriff, or the sureties on his first bond are liable for money lawfully in his hands when the second bond was executed, and whether the first sureties are responsible for a default occurring during the currency of the second bond in the completion of business begun during the first term, or in other words, whether a sheriff can be at the same time an ex-sheriff as to his first term, and an acting and legal sheriff as to his second term.

This question came up in a Missouri case over thirty years ago. The sheriff, during his first term had sold land on credit under the order of a court of competent jurisdiction, and after having been re-elected and given bond, received the purchase money and converted it to his own use. There was a statute which provided in effect, that an ex-sheriff may, at the risk of his sureties, complete partition proceedings for sale of lands begun during his term of office, receive purchase money and pay it over to the parties entitled thereto. Upon this statute it was insisted that the receipt of the purchase money by the sheriff, was in his capacity of ex-sheriff. The court held that the sheriff received the money as acting sheriff, not as ex-sheriff, that he received it *colore officii*, and that his sureties on the second bond were liable for it.¹

§ 643. Obligation of surety of subordinate not affected by hiatus caused by re-appointment of principal.—The liability of a surety, it has been repeatedly said is controlled by the terms of the bond. If the bond of an under-

¹ *Ingram v. McCombs*, 17 Mo. 558. This case overrules, but without mentioning it, that of *Marney v. State*, 13 Mo. 7, 10.

sheriff requires him to execute well his office during his continuance in it, the obligation incurred by him and his sureties is not affected by the nominal *hiatus*, in the office of his principal, the high-sheriff, incident to the expiration of one term of office, and his re-appointment for another term. There being no period of time in which the obligee of the bond was not high-sheriff, there was no period at which the under-sheriff, ceased to hold that office, his term of service was continuous, and the sureties were bound as well for the time after, as before the re-appointment of the high-sheriff.¹

§ 644. Liabilities of sureties of officers who hold “until their successors are elected and qualified” — Different rule as to those officers who hold simply for a fixed term. — When an officer is appointed or elected to hold for a given term and until his successor shall have been elected (or appointed) and qualified, the liability of the sureties on his official bond extends to the end of his term and at least a reasonable time thereafter. But if the tenure of office is for a limited time, and not until the induction of his successor, the rule is otherwise, the liability of the sureties closes with the term, and a payment made after the expiration of the term to a deputy of the officer who was holding over without re-appointment, imposes no obligation upon sureties of the ex-officer.²

§ 645. When plaintiff may elect whether to proceed on first or on second bond. — When an officer whose duty it is made by law to receive and collect claims, fails by culpable negligence to collect during his first term of office, a claim duly placed in his hands for that purpose, such neglect is a breach of his bond and his sureties are liable. And

¹ Hughes *v.* Smith, 5 Johns. 168, 172.

² State *v.* Langdon, 7 Jones (N. C.), 49. See, also, State *v.* Stone, 7 Jones (N. C.), 882; Chairman, etc., *v.* Daniel, 6 Jones (N. C.) 444.

if the claim remains in his hands without withdrawal or other action by the owner, until the beginning of his second term, and his negligence is continued so that during that term, and by reason of such negligence the claim is lost, the debtor becoming insolvent during that period, the sureties on his second bond are liable for the loss. And it is no defense that the creditor might have held the first set of sureties liable. He had the right, but was not bound to do so.¹

§ 646. Sureties on official bonds.—Whether liable for duties imposed by subsequent legislation. — Whether the sureties on an official bond are liable for the performance by their principal, of duties imposed by subsequent legislation, is a subject on which there have been contradictory decisions. In 1824, it was decided by the supreme court of the United States, that sureties in an official bond are not liable for the performance of duties imposed by subsequent laws, and not contemplated by the condition of the bond.² It is held, however, in a very late case (1880),³ that sureties are liable for the faithful performance of all duties imposed upon the officer, whether by laws enacted previous or subsequent to the execution of the bond, which properly belong to and come within the scope of the particular office, though not for those which have no connection with it and cannot be presumed to have been within the

¹ Governor *v.* Lee, 4 Dev. & B. 457. See, also, State *v.* Wall, 9 Ired. L. 20.

² United States *v.* Kirkpatrick, 9 Wheat. (22 U. S.) 720, 738.

³ United States *v.* McCarney, 1 Fed. Rep. 104, 113; *s. c.*, 4 Myers' Fed. Dec., § 427. In this case, Judge Lowell cites Postmaster-General *v.* Munge, 2 Paine C. C. 189; Boody *v.* United States, 1 Woodb. & (c. c.) M. 150; White *v.* Fox, 22 Me. 341; Illinois *v.* Ridgway, 12 Ill. 14; Smith *v.* Peoria Co., 59 Ill 412; People *v.* Vilas, 36 N. Y. 459, 465; Mayor *v.* Sibberns, 3 Abb. App. Cas. 266; Bartlett *v.* The Governor, 2 Bibb, 586; Colter *v.* Morgan, 12 B. Mon. 278; Commonwealth *v.* Gabbert, 5 Bush, 438; Marney *v.* State, 13 Mo. 7; King *v.* Nichols, 16 Ohio St. 80; United States *v.* Ganssen, 2 Woods, 92; *s. c.*, 7 Otto, (97 U. S.) 584; United States *v.* Powell, 14 Wall. (81 U. S.) 493; United States *v.* Singer, 15 Wall. (82 U. S.) 111.

contemplation of the parties when the bond was executed. It is conceded, however, that the rule does not apply if the office has been wholly changed, or if the new duties are not germane to those of the original appointment. With these qualifications as to the application of which there must needs be much uncertainty, the differences between the two classes of rulings is neither great nor well defined. In the case of a distiller,¹ it was held that as already the law imposed many burdens upon the principal, the sureties at the time of executing the bond, could hardly be supposed to contemplate the probability that the government would, during the currency of their bond, impose upon their principal the duty of paying, and upon them the responsibility of guaranteeing the salary of one of its own officers. And in Illinois there was a like ruling.² A grain inspector who gave bond to discharge the duties of his office was, by legislation after the execution of his bond, charged with the duty of collecting and accounting for inspection fees. The court said that: "When the bond of Tompkins was executed therefor, his sureties were not chargeable with knowledge by the law that he would be required to collect and have the custody of the fund in controversy, * * * it follows, it cannot be held within the contemplation of the parties in executing the bond that they were assuming any liability on that account."

In view of the well settled principles that the liability of sureties is *strictissimi juris*, and cannot be extended by implication, it is a little difficult to conceive of a case in which a new burden can be imposed upon sureties after the execution of their bond, which will not fall within one or another of the qualifications embodied in the numerous decisions, or else conflict with the unbending principles by which the interests of sureties are protected.

¹ *United States v. Singer*, 15 Wall. (82 U. S.) 111.

² *People v. Tompkins*, 74 Ill. 482.

§ 647. **Same subject continued.** — It must always be borne in mind that the terms of an official bond control the liability of the obligors. It depends upon the fair and legitimate construction of those terms whether the officer and his sureties are liable for the performance of duties imposed by statute enacted after the execution of the bond. The rulings on this subject are not uniform. In some states it has been held that the law in force at the date of the bond is the only law that enters into and forms a part of the contract. In Kentucky it has been decided that a sheriff's bond, conditioned to perform the duties of his office, could be put in suit for non-performance of duties imposed by statutes enacted subsequently to the date of the bond. The court says: "So soon as the law imposed the duty on the sheriff, the bond became obligatory on him for a faithful performance of that duty."¹

§ 648. **Same subject continued.** — It is certainly true, as held in an Iowa case, that the sureties are responsible when, by the terms of the bond, the liability is distinctly expressed. Under the words—"now or hereafter required of his office by law," the sureties were responsible for their principal's default in the management of the school fund under a law enacted after the execution of the bond.²

§ 649. **Same subject continued.** — In several of the states laws, enacted after the execution of official bonds, which change the times at which their obligors shall be required to settle and pay, form no part of the contract with the sureties and have no effect upon their obligations. Thus, in Indiana, during the term of a county treasurer, a law was enacted which changed the time at which such officers should settle their accounts from January to

¹ Bartlett *v.* The Governor, 2 Bibb, 586.

² County of Maheska *v.* Ingolls, 14 Iowa, 170.

February, and the time when they should make their payments from January to March and the court held that this change did not affect the liability of sureties and that the statute was merely directory to the officers.¹

And where during the war of the rebellion, a county treasurer was charged by statute with the duty of receiving and disbursing large sums of money as the bounty fund of the county, and made default in those funds, as well as in the money usually received by the treasurer in the ordinary discharge of his official duties, his sureties were held liable on the latter defalcation, but not on the former. And this although by the terms of the bond the sureties were responsible for "all moneys that shall come to his hands as county treasurer."²

§ 650. Sureties not liable for new and different duties imposed by law upon their principal after the execution of the bond. — While it is very true that under certain circumstances additional duties may be imposed upon an officer during the currency of his term, and his sureties held liable for the due discharge of those duties, it is essential that the new duties shall be of the same nature and germane to the old ones. Sureties on an official bond are not responsible for the discharge of such new duties imposed after the execution of the bond, if those duties are of an entirely different character from those for which they contracted. Thus where, when his bond was executed, the duties of a superintendent of water-works of a city were simply to "superintend" those works, and (presumably) implied a knowledge

¹ *Kivelle v. State*, 7 Blkfd. (Ind.) 587; *United States v. Kirkpatrick* 9 Wheat. (22 U. S.) 720, 736; *United States v. Vanzandt*, 11 Wheat. (24 U. S.) 184, 190.

² *Supervisors' Monroe County v. Clarke*, 25 Hun (82 Sup. Ct. N. Y.) 282. This ruling may fairly be considered falling within the principle stated in the next section. The officer was exposed to special temptation, and the surety to additional jeopardy contemplated by neither when the bond was executed.

of machinery, hydraulics and matters of that sort, and had no connection with the financial affairs of the city, his sureties could not be held liable for his discharge of the duty of collecting water-rates and accounting for the money. Manifestly, there was a radical and essential variation of duty, which would forbid any idea that the sureties contracted with the expectation of being held responsible for their principal's discharge of these new and incongruous duties. They might well guarantee that their principal was competent and trustworthy as a mechanical engineer, and that he knew all about steam engines and water-works, and yet decline to be bound for his diligence, care, and good faith in the collection and disbursement of large sums of money. Of this opinion was the court, who said that the new duties and additional peril were beyond the engagement of the sureties, and that they were not liable for his defalcation.¹

§ 651. Continuity and identity of principal's office essential to sureties' liability—It is, moreover, essential to the continuance of the sureties' liability, that there shall be not only continuity but identity in the office of the principal. In England, however, a change of the tenure of the office during the incumbency of the officer, as from a tenure by election for the term of one year, to a tenure at the pleasure of the appointing power, is no breach either of the identity of the office, or of the continuity of the officer's service, and consequently this circumstance does not discharge a surety, whose covenant was for the due discharge of the duties of the office, “during the whole time of his continuing in office in consequence of said election, or under any annual or other future election.”²

¹ *City of Lafayette v. James*, 92 Ind. 240, 246; *People v. Pennoch*, 60 N. Y. 421; *Manufacturers' Nat. Bk. v. Dickerson*, 41 N. J. L. 448; *s. c.*, 32 Am. Rep. 237; *White, etc., Co. v. Mullins*, 41 Mich. 339; *Munford v. M. & C. etc., Co.*, 31 Am. Rep. 616.

² *Oswald v. Mayor of Berwick*, 5 H. of Lords, 856.

§ 652. **The imposition by law of new duties upon an officer does not affect the liability of his sureties for the performance of his old duties —** Although the imposition of new and additional duties upon an officer during his term of office, may or may not devolve a responsibility upon his sureties on his official bond for the manner in which he shall discharge such new duties, it is certainly true that these additions to his functions in no degree diminishes either his liability, or that of his sureties on his official bond with reference to the original and normal duties appertaining to his office.¹

§ 653. **Effect on the liability of a surety, of the repeal or change of the law authorizing the bond —** If the law under which an official bond was executed shall be repealed, it does not follow, as of course, that the repeal exonerates the sureties on such a bond from liability for the subsequent acts of their principal. Thus, in Illinois, during the term of a collector of taxes, all the laws on that subject then in force were repealed together, but all the material provisions of those laws were incorporated in the repealing act. The sureties claimed that the repeal of the law under which their bond was given, operated to discharge them altogether, but the court held that they had no cause of complaint, and were entitled to no exemption from liability, unless the change operated to their prejudice, and that they were responsible for the performance of all the duties within the scope of their principal's office, imposed by law, either before or after the execution of the obligation.²

§ 654. **Sureties — Not liable on official bond for statutory fines and penalties imposed on principal. —** The obligation of a surety for the due discharge of his official

¹ *Gaussin v. United States*, 7 Otto (97 U. S.), 584.

² *People v. Leet*, 13 Ill. 261, 269; *Governor v. Ridgway*, 12 Ill. 14; *Campbell v. People*, 12 Ill. 290.

duties by his principal, is that the surety will answer the damage that may result from a breach of the bond; it is not that the principal will respond to such fines and penalties for his misconduct, as may be prescribed by law, and awarded by judicial authority. The fine and penalty are punishment for neglect of duty, and may be imposed or incurred, irrespective of actual damage or loss suffered by any one. Thus, an officer may be fined, or have a judgment rendered against him for a penalty, in a case in which nominal damages only could be recovered on his official bond, the breach of his duty not having caused any actual loss to any one.¹

§ 655. Surety — Liability of, on official bond for trespass committed by principal. — Whether a surety is liable on his official bond for a trespass committed by his principal in the execution of his office depends of course, on the terms of his bond and on the nature of the duties required of the officer. The question in practice arises only with reference to the office of sheriff and similar offices such as marshals, coroners, constables, the execution of whose duties frequently require recourse to the "strong hand." Whether the surety is liable when the officer develops the *fortiter in re* in the wrong direction, or upon unsuitable occasions may depend upon the statute of the state prescribing the bond. In Virginia, it has been held that under the laws of that state a sheriff who, under process against A. takes the property of B., commits a trespass, violates the duty of his office and breaks the condition of his official bond. Consequently his sureties are liable.² There have been like adjudications in other states, in Pennsylvania³

¹ *McDowell v. Burwell*, 4 Rand. 317.

² *Sangster v. Commonwealth*, 17 Gratt. 124, 130; *Davis v. Commonwealth* 13 Gratt. 139, 144.

³ *Cormack v. Commonwealth*, 5 Binn. 184.

and in Maine,¹ in Kentucky, Missouri, California, and in New York.²

§ 656. Same subject continued. — A sheriff's bond is in form to the state; it is in effect a security, not only to suitors who may have a direct interest in the action of the sheriff, but to every citizen who may be injured by his official misconduct. An officer receives process of that character, not merely *colore officii*, but *virtute officii*, and whatever he does under the process purports to be by virtue of his office, and if it is done amiss it is a misfeasance in office, and not a mere naked unauthorized trespass. Irregularities in the performance of an official duty commanded by legal process do not deprive the proceeding of an official character, for statutes framed for the protection of public officers, which refer to the acts done *virtute officii*, have been uniformly held to extend to acts of misfeasance.³ It is settled beyond controversy that a trespass committed by a deputy sheriff in the attempted execution of valid and legal process can be held to charge the high sheriff, his principal, and there is no reason why the sheriff's own act, in like case

¹ *Archer v. Noble*, 3 Me. (3 Green 1.) 418; *Harris v. Hansen*, 11 Me. 241; *Forsythe v. Ellis*, 4 J. J. Marsh. 299; 20 Am. Dec. 218; *Commonwealth v. Stockton*, 5 T. B. Mon. 192; *State v. Moore*, 19 Mo. 369; *Van Pelt v. Littler*, 4 Cal. 194.

² *People v. Schuyler*, 4 N. Y. 173. See, also, *Brunott v. McKee*, 6 Watts. & S. 513; *Greenfield v. Wilson*, 18 Gray 384; *Tracy v. Goodwin*, 5 Allen 409; *State v. Jennings*, 4 Ohio St. 418; *Jewell v. Mills*, 3 Bush. 62; *State v. Kirkpatrick*, 64 Mo. 185; *Charles v. Haskins*, 11 Iowa 329; *Turner v. Killian*, 12 Neb. 580; *Holliman v. Carroll*, 27 Tex. 23; *United States v. Hine*, 3 McArthur, C. C. 27; *Lowell v. Parker*, 10 Metcf. (Mass.) 309, 313; 43 Am. Dec. 436. See however, *People v. Lucas*, 93 N. Y. 585, which distinguishes the case of *People v. Schuyler*, 4 N. Y. 173, the bond in the latter case being broader than that in the former.

³ *People v. Schuyler*, 4 N. Y. 173, 181; *Straight v. Gee*, 2 Stark. 448; *Weller v. Toke*, 9 East, 864; *Morgan v. Palmer*, 2 Barn. & Cr. 729; *Seely v. Birdsall*, 15 Johns. 268; *Grinnell v. Phillips*, 1 Mass. 530

and under similar process, cannot be held to charge his sureties.¹

The latest case on this subject, was decided March 17, 1884, by the supreme court of the United States, and the opinion, delivered by Mr. Justice Gray, is very thorough and exhaustive, reviewing the principal cases on the subject and settling the law as far as the ruling of a court of the highest authority can settle it, that the officer and his sureties are liable for taking, under process against one person, the property of another. This opinion is quoted very fully in another part of this work to which the reader is referred.²

§ 657. The liability of sureties is the usual question in cases involving the validity and enforcement of official bonds. — It is very obvious upon slight inspection of the cases in which official bonds have formed the foundation of the action, or their validity and application have been indirectly brought before the court, that it is the interest and safety of the surety which forms the leading inducement to the litigation. The principal can rarely make any defense, when an action on his bond is brought against him, but the surety resorts to every conceivable expedient to escape the loss which is about to be inflicted upon him in consequence of his kindness or imprudence. The consequence is that a great variety of defenses have been made by sureties to actions of this character, some impugning the validity of the bond on the ground of defect in its execution or delivery, and others tending to

¹ *People v. Schuyler*, *supra*; *Grinnell v. Phillips*, 1 Mass. 580; *Ackeworth v. Kempe*, Doug. 42; *Gentry v. Hunt*, 2 McCord, 410; *Skinner v. Phillips*, 4 Mass. 69. See, also, *Archie v. Noble*, 3 Me. 418; *Harris v. Hanson*, 11 Me. 241; *Comack v. Commonwealth*, 5 Binney, 184; *Forsyth v. Ellis*, 4 J. J. Marsh. 299; 20 Am. Dec. 218; *Commonwealth v. Stockton*, 5 Monr. 192.

² *Ante*, § 303; *Lammon v. Fensier*, 111 U. S. 17.

defeat its enforcement, because of the misconduct of its obligee or beneficiary.

§ 658. What omission will release a surety on an official bond. — The insertion of the names of persons as sureties in an official bond, is a representation to each of them that all the others will be his co-sureties if he signs the bond, and that their signatures will be obtained before it shall be delivered. Such a bond will not be obligatory upon any, until the signatures of all are secured. The recital of the names in the bond is notice to the approving officer of this representation, and that all these persons must execute the bond before any of them can be legally bound upon it. And if for any reason the bond is not obligatory upon one of those who has signed it, it is not binding upon those who sign it after him, for they have a right to presume that all the persons whose names preceded theirs will be co-securities and equally bound.

It is the duty of the board, court, or other official body or person whose function it is to approve or accept a bond for the state or corporation which is its obligee, to make proper inquiry and investigation, and if the bond is accepted upon the report of the principal obligor without investigation, the presumption is that he was constituted the agent of the board or other functionary, and that his acts and representations bound such accepting board or officer, who had thus adopted his acts as a substitute for appropriate inquiry.¹

§ 659. Same subject continued. — In a Maine case a bond recited the names of a number of sureties, all of

¹ Pepper *v.* State, 22 Ind. 399. See, also, Pawling *v.* United States, 4 Cranch (8 U. S.), 219; Sharp *v.* United States, 4 Watts, 21; 28 Am. Dec. 676; United States *v.* Leffler, 11 Pet. (36 U. S.) 88; Lovett *v.* Browne, 3 Wend. 380; Fletcher *v.* Austin, 11 Vt. 448; 34 Am. Dec. 698; Bibb *v.* Reed, 3 Ala. 88; Johnson *v.* Baker, 4 Barn. & Ald. 440; Duncan *v.* United States, 7 Pet. (32 U. S.) 435; Fay *v.* Richardson, 7 Pick. 91; King *v.* Smith, 2 Leigh, 157.

whom signed it except one, Whittier. It appeared that after the principal and three of the sureties had signed the bond, Whittier declined; his name was then erased from the bond and afterwards the other sureties signed it. The court held that if a surety signed the bond on condition that all the persons whose names were recited in it should sign it, such surety would not be liable in case all did not sign, but if he signed without that condition, he would be liable although he might have expected when he did sign that all the persons named in the bond would sign it. The court said further that "when a party executes an instrument which, from its terms, creates a liability, he is ordinarily supposed to know its contents, and everything apparent upon it and is affected accordingly if no fraud is practiced upon him. * * * The liability is made to depend upon the fact that the sureties who signed did not annex the condition, that the bond was not to be delivered until it was signed by all whose names were on the list accepted by the town." The ruling may otherwise be stated, that if the signature be given upon *condition* that all shall sign, the surety may be absolved by a failure of that condition, but not if the signature be given upon an *expectation*, however reasonable, that all the parties named in the bond will sign it.¹

§ 660. When the fact that co-surety's signature is forged will exonerate surety.—And if when a bond is in the possession of the accepting court or officer and a surety signs it upon the faith, in part, of the preceding signatures, he has a right without special inquiry to presume that their signatures are genuine, and if either of them prove to be a forgery, or otherwise invalid, so that the supposed surety is not bound by it, the bond is on that account void as to such posterior surety.²

¹ Readfield *v.* Shover, 50 Me. 36.

² Chamberlain *v.* Brewer, 3 Bush, 561; Seeley *v.* People, 27 Ill. 173; Pawling *v.* United States, 4 Cranch (8 U. S.), 219. See also Pepper *v.* State 22 Ind. 399; and cases cited *ante*, § 658.

§ 661. **When surety will be released by the negligence of the obligee of an official bond.**—If the obligee of an official bond is aware that the principal obligor is a defaulter in his office, and nevertheless fails to call him to account or to remove him, such negligence will operate to release the securities on the bond, and it is a fraud not to give them prompt and timely notice of such defalcation. But the negligence of the principal in the discharge of his duties, delay, procrastination, or general inefficiency does not impose upon the obligee the necessity of notifying the sureties of such deficiencies, nor operate to relieve them of the obligation which they have assumed. And this is true although the principal obligor habitually disregarded a wholesome rule which the obligee himself had told the sureties, when they executed the bond, was a rule of the office. Unless such an omission to make the facts known to the sureties, or other conduct by which they were misled, was the result of a fraudulent purpose on the part of the obligee, the surety could not be released by it. This rule it may be remarked is applicable only when the obligee is an official person as a sheriff or other officer, or a corporation responsible for the defaults and frauds of its president and directors; it cannot be enforced against the United States or other sovereignty, which is not responsible to the surety for the laches of officers.¹

§ 662. **Negligence of directors and other like officers — When it will not relieve sureties.**—The securities upon a cashier's bond cannot evade their liability upon it on the ground that the directors of the bank had negligently omitted to inform themselves as to the condition of the bank, and had accepted without due investigation, the statements of its condition furnished by the cashier. It was by the terms of the bond the duty of the cashier to make

¹ *Gradle v. Hoffman*, 105 Ill. 147.

known to the directors any false entry or other error that he might discover in the books of the bank, and the undertaking of his sureties was, among other things, that he should faithfully do so. Sureties cannot be exonerated because the directors failed to discover that which the sureties expressly guarantee that their principal shall reveal.¹

§ 663. Same subject continued. — The changes made in the duties of bank officers after they have given bond and been duly inducted into office, have frequently raised the question whether a defalcation in a trust not strictly within the terms of the bond, is properly chargeable to the sureties who have guaranteed the probity of the officer. The liability of the surety depends in a great measure upon the terms of the obligation, as well as the congruity of the new duties assigned to the officer, the presentation of additional temptation, and special facilities for embezzlement, not anticipated when the obligation was contracted. For these reasons the rulings are contradictory and generalization difficult. It cannot be said in view of all the decisions on the subject that there is or can be any general rule. The sureties of an assistant book-keeper were held responsible on a bond the condition of which was that he should "faithfully discharge the trust reposed in him as such assistant book-keeper." The charge was an embezzlement committed while keeping books properly appertaining to the teller, and in this line of duty he had been employed for thirteen months previous to the defalcation. The court held that it was immaterial that the embezzlement was committed while he was engaged in keeping these books, that the bond was an engagement that he would not avail himself of his position to misapply the funds of his employer, and that the appropriation of the bank's money, and the fraudulent entries used to conceal it, constituted a breach of the bond which

¹ *Frelinghuysen v. Baldwin*, 16 Fed. Rep. 452; *Miner v. Mechanic's Bank*, etc., 1 Pet. (26 U. S.) 46.

rendered the surety liable, irrespective of the increased temptation and opportunity for fraud created by the change in the book-keeper's duties.¹

§ 664. Surety not liable on his official bond for default of officer when acting in a different though collateral capacity. — On the other hand sureties of the clerk of a court are in no respect liable upon their bond for defaults committed by their principal while acting as receiver by the appointment of the court. The two offices, clerk and receiver, are wholly disconnected.² And the incumbent of the former cannot be compelled to act as receiver. Still it may be said that where property is in the actual custody, or the immediate cognizance of the court, the clerk may be charged with the duty of selling the property and collecting, keeping and disbursing its proceeds and in such case the sureties on his official bond will be liable for the faithful discharge of that duty.³

§ 665. When functions of officer have been divided and two bonds given, sureties on one are not liable for breaches of the other. — When the functions of an officer have been divided by statute and for each portion a separate bond has been prescribed, it is manifest that the sureties on the one bond are in no respect liable for the defalcations of the officer properly chargeable to the other. And if the penalty of a bond is fixed at half the minimum sum prescribed by the law, a payment by a surety of the defalcation of the officer to an amount exceeding that penalty, is a full discharge of the bond, and it is immaterial whether such payment was, or was not made under the coer-

¹ Rochester, etc., *Bank v. Elwood*, 21 N. Y. 88.

² *Rogers v. Odom*, 86 N. C. 432; *Waters v. Carroll*, 9 Yerg. 102; *Williams v. Bowman*, 3 Head, 681; *State v. Blakemore*, 7 Heisk. 681; *Hammer v. Kaufman*, 39 Ill. 87; *Kerr v. Brandon*, 84 N. C. 128.

³ *Rogers v. Odom*, *supra*; *Kerr v. Brandon*, 84 N. C. 128; *Judges v. Deans, 2 Hawks*, 98; *McNeill v. Morrison*, 63 N. C. 508; *Cox v. Blair*, 76 N. C. 78.

cion of legal process, for a payment which can be compelled by law is not voluntary or officious.¹

§ 666. Liability of surety on official bond cannot be extended by general words. — When an official bond has been given in which, by appropriate and sufficiently definite words, a specific duty is imposed upon the officer and its performance guaranteed, the liability of the surety on such bond cannot be extended by the addition of general words so as to include other duties not properly embraced by the particular language employed in the bond.² It is a well settled principle of construction that the scope and operation of general terms are controlled by the particular and specific language used in the same connection, and that the general words can only extend the operation of the specific terms to matters of the same character and nature as those which are specified.

§ 667. Protection of surety afforded by courts of equity. — The protection afforded by courts of equity to sureties in general is as ample as could reasonably be desired. If a surety apprehends danger from the delay of the creditor he can in equity compel him to sue the principal debtor, but in a proper case must furnish indemnity for risk, expense, etc.³ It may be remarked, however, that in many of the states this matter is now regulated by statute, and expeditious and even summary remedies are provided, by which sureties can cause their principal to be put to the test of his solvency, and the creditor compelled to press his claim upon the principal under penalty of losing his remedy against the surety.

¹ *State ex rel. v. Blakemore*, 7 Heisk, 638.

² *Governor v. Matlock*, 1 Dev. L. 214. See, also, *Amors v. Johnson*, 3 H. & McH. 216.

³ *Hayes v. Ward*, 4 Johns. Ch. 123. See, also, *King v. Baldwin*, 2 Johns. Ch. 559; *Rees v. Berrington*, 2 Ves. jr. 540; *Boulbee v. Stubles*, 18 Ves. 20.

§ 668. **Special provisions limiting the right of action on official bonds as against sureties.** — The limitation of actions on official bonds, and of the summary proceedings by motion equivalent thereto, is a matter of no small importance to the sureties on such bonds. Besides the general laws of limitation of actions, and the presumption of payment from lapse of time, some of the states have enacted special statutes for the benefit of such sureties. Under the statute of Alabama which limits actions of this character against sureties to six years, it has been held that the statute begins to run when the responsibility of the surety is conclusively ascertained, as in case of a sheriff's conversion of money collected under an execution, the statute will run from the return of the execution satisfied.¹

§ 669. **Surety not liable for money irregularly paid to principal.** — When money is paid to a sheriff on an execution after the day on which it should have been returned, there is no satisfaction of the process, and no motion can be sustained against the sheriff, nor *a fortiori* against his sureties, on account of his failure to pay over such money. The sheriff is responsible in an ordinary action in his individual capacity, but he is not officially responsible.²

§ 670. **Sureties not liable on a bond exacted, by a court acting ultra vires.** — If a county court or other equivalent tribunal assumes the power to require of a ministerial officer additional security, under circumstances which do not in law authorize it to do so, and upon his failure to furnish such security proceeds, *ultra vires*, to vacate his office and appoint another person in his place, all the proceedings of the court touching the matter are simply void, the office is not vacated, the pretended successor is no officer at all,

¹ Governor *v.* Stonum, 11 Ala. 679.

² Barton *v.* Lockhart, 2 Stew. & Port. 109. See, also, Barton *v.* Pecks, 1 Stew. & Port. 486.

and the original incumbent continues to be the officer throughout. And if upon second thought, the court reinstates the officer who gives a second bond, that bond is merely voluntary, and the giving it does not operate to discharge the sureties in the original bond.¹

§ 671. Sureties — Subrogation of to rights of obligee.— Sureties on the official bond of an officer, having paid the money with which they stood charged, have a right to be subrogated to all the remedies of the plaintiff against their principal and, if there is any other person chargeable with the amount, as for example an execution defendant, against him also. Thus the sureties of a sheriff, having paid a judgment against them for their principal's failure to pay over money alleged to have been collected by him, were entitled to a new execution against the defendant, it appearing that he had not in fact paid the money to the sheriff, although the latter had entered satisfaction on the execution.²

¹ Sheeley *v.* Wiggs, 32 Mo. 398, 405.

² Saint *v.* Ledyard, 14 Ala. 244.

CHAPTER XIX.

GENERAL LIABILITIES OF SURETIES ON OFFICIAL BONDS.

PART II.

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- 700. Same subject continued.
- 701. Same subject continued.
- 702. The liability of surety on official bond is a debt — Conveyance to defeat it, is a fraud.
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- 704. Sureties not liable on bond executed by them when it was imperfect.

§ 672. When sureties are estopped by their bond from denying their principal's official status — Statute of limitation — Prescription — Burden of proof. — In an action on the official bond of a constable it is not competent for the sureties to give in evidence that the constable, their principal, had not taken the oaths prescribed by law. Having been duly appointed or elected, having given bond, and proceeded to act as constable, he is presumed to have complied with all the other necessary qualifications. The officer himself cannot defend on the ground of his own neglect, and his securities are in point of law in the same situation. And in an action against sureties it is not necessary for the plaintiff to show that the claims on which the suit is founded are good and valid, and are not prescribed by the statute of limitations. The receipt of an officer is *prima facie* evidence of the validity of the claim for which he gives his receipt, not only against him but against his sureties, and it cannot be regarded as a presumption of law that a debtor *will* plead the statute of limitations in bar of an action. The invalidity of the claims, with the loss or neglect of which an officer is charged, is a matter of defense that must under proper pleadings, be made to appear by the defendant's sureties, and the fact that the statute of limitations might be successfully relied upon, is only available in their interests after such defense has been actually made.¹ In Louisiana, however, there is a con-

¹ *Burtles v. State*, 4 Md. 273, 279; *Lawrensen v. State*, 7 Harr. & J. 389.

trary ruling in a case in which the neglect of a clerk to issue process, enabled the defendant to plead prescription. In that case the court said: "It does not lie in the mouth of the clerk and his sureties to say that the defendant will not plead it (the prescription); the presumption in such case is that he will, and the burden of proof is on them to rebut it."¹

§ 673. Estoppel — What will estop a surety. — The sureties on the official bond of an officer, which has been duly approved and accepted by the proper authority, cannot raise the question of their principal's eligibility to the office. They, as well as he, are estopped by the bond itself, and if upon their requisition a new bond is given by their principal, they are nevertheless responsible for all defaults committed by him prior to the acceptance of the new bond, unless by the terms of the statute, the new bond includes antecedent delinquencies, and expressly releases the sureties on the first bond.²

And upon the same principle it is not competent for the sureties of a *de facto* officer to set up in avoidance of their liability, the deficiency of their principal's title to the office. They are estopped by their bond. Thus where a constable failed to give the required security within the time limited by law, but executed and delivered the bond after the expiration of that time, his sureties were held to the same responsibility as if the bond had been executed in strict accordance with the terms of the statute and within the limited period.³ And a principal in an official bond is estopped in an action against him upon it, brought to recover public moneys in his hands,

¹ *Anderson v. Johett*, 14 La. Ann. 614. See, *ante*, § 456.

² *Jones v. Gallatin County*, 78 Ky. 491.

³ *Weston v. Sprague*, 54 Vt. 395; *Bowman v. Barnard*, 24 Vt. 362; *Bank v. R. R. Co.*, 80 Vt. 167.

to deny that he is a *de jure* officer, and his sureties are likewise precluded from the defense that their principal had no title to the office.¹

§ 674. Same subject continued.—It is not competent for the securities of a tax collector to deny that he is such collector when the recitals of their bond describe him as such. The recital that B. “shall well and faithfully execute his office as collector,” etc., as fully admits the fact that he was collector, as if it had been stated in so many words, and is conclusive upon the obligors of the bond in which such a recital appears.²

§ 675. Law which enters into and becomes part of the surety's contract.—It is unquestionably true, that the law relating to a contract in force when the contract is made, enters into and becomes a part of it. It has, however, been held that statutes merely directory to officers, although they may be in force when the contract is made, do not enter into and become a part of the contract of sureties on official bonds. Of this character, are statutes which require from officers frequent and stated settlements. An omission of the obligee of the bond to exact such settlements from the officer in no degree operates to release the surety.³ And in Virginia, if by such statutes, stated settlements are prescribed, and after the execution of the bond of the officer, the legislature extends the time for such settlements, the sureties on the bond are not released by the extension.⁴ Whether this latter ruling is the law, may be and has been,

¹ *Byrne v. State*, 50 Miss. 688; *Taylor v. State*, 51 Miss. 79; *Stow v. Wyse*, 7 Conn. 214; 18 Am. Dec. 99.

² *Billingsley v. State*, 14 Md. 369.

³ *Commonwealth v. Holmes*, 25 Gratt. 771; *United States v. Kirkpatrick*, 9 Wheat. (22 U. S.) 720, 736; *United States v. Van Zandt*, 11 Wheat. (24 U. S.) 184; *United States v. Nichol*, 12 Wheat. (25 U. S.) 509; *United States v. Boyd*, 15 Pet. (40 U. S.) 187, 208.

⁴ *Commonwealth v. Holmes*, *supra*.

very seriously questioned. It is, however, true as further held, than when to the original functions of the bonded officer, new duties are added by legislation subsequent to the bond, the sureties of the officer are not bound for his discharge of those duties, nor are they released from their obligation as to the old duties, by reason of the imposition by the new ones.¹

§ 676. Same subject continued.—Rule as to by-laws. —The liability of sureties on an official bond are of course controlled by the terms of the bond and the statute authorizing it, and when by that statute authority is given to a board, committee, or other collective body to prescribe rules and regulations by which the officer shall be governed, such rules and regulations form part of the law which controls his liability. Hence a grain inspector whose bond was conditioned that he should faithfully and strictly discharge the duties, etc., according to law and the rules and regulations prescribing his duties, and pay all damages to any person or persons who might be injured by reason of his neglect, etc., was held responsible upon his official bond, with his securities, for failure to pay over to his successor in office fees collected by him as such inspector, that payment having been made his official duty by the rules and regulations prescribed by the board. The liability of the sureties was not limited by the clause in the bond requiring the inspector to pay all damages, etc., for that clause, did not restrict the liability of the obligors, but added a new responsibility to that expressed in the preceding sentence.²

§ 677. Sureties cannot impute laches to the government. —It has been repeatedly held that the government is not responsible for the laches or wrongful acts of its

¹ Commonwealth *v.* Holmes, *supra*. See, *ante*, §§ 646, *et seq.*

² People *v.* Harper, 91 Ill. 357, 372.

officers.¹ Every surety upon an official bond to the government is presumed to enter into his contract with a full knowledge of this principle of law, and to consent to be dealt with accordingly. The government enters into no contract with him that its officers shall perform their duties.

§ 678. Measure of the liability of the sureties on official bonds. — The liability of sureties on an official bond is always measured by the conditions of the bond, and not by the duties imposed by the law upon the officer. Thus it may well happen that the officer may be grossly in default, liable to a civil action, or even to a criminal prosecution for official derelictions, and yet his sureties be wholly unaffected thereby. As an instance may be cited the case of a register of deeds in North Carolina whose duty it was, (among other things) to issue marriage licenses. He issued a license authorizing the marriage of a girl under eighteen years of age, without the consent of her parents, and thereby incurred a statutory penalty, and perhaps an indictment, and yet his sureties were in no degree liable because it was not “so nominated in the bond.”²

§ 679. Appropriation of payments — Successive bonds. — It is a well established rule that when different sets of sureties are interested, the appropriation of payments to the oldest liability of the principal will not be permitted. A surety can only be bound from the date of his bond. Although the principal may be a defaulter when the bond is executed the surety is not bound for such default,

¹ *Hart v. United States*, 5 Otto (95 U. S.), 316; *Gibbons v. United States*, 8 Wall. (75 U. S.) 269; *United States v. Kirkpatrick*, 9 Wheat. (22 U. S.) 720; *United States v. Van Zandt*, 11 Wheat. (24 U. S.) 184; *United States v. Nicholl*, 12 Wheat. (25 U. S.) 505; *Jones v. United States*, 18 Wall. (85 U. S.) 662.

² *Holt v. McLean*, 75 N. C. 347; *Moritz v. Ray*, 75 N. C. 170; *Eaton v. Kelly*, 72 N. C. 110; *State v. Brown*, 11 Ired. 141; *State v. Long*, 8 Ired. 415; *Crumpler v. Governor*, 1 Dev. 52.

unless the bond specially stipulates for past performances, or unless the money previously received be actually in the hands of the principal. There is, however, this further rule on the subject, that when in the accounts of a public officer the payments for any quarter exceed the receipts of that quarter, the surplus shall be applied to the balance standing against the officer at the beginning of the quarter.¹

§ 680. **Same subject continued.** — The rule of the appropriation of successive payments to an indebtedness composed of several separate accounts, is that the debtor may, upon making a payment, or afterwards, make an appropriation, or designate to which of the accounts the payment is to be credited. If he fails to do this in a reasonable time, the creditor may designate the account to which the payment shall be applied, if neither does it, the law applies the payment to the oldest of the several debts. Upon this principle where in the accounts of a tax collector for four successive years, there appeared a balance against him for each year, the proper mode of settling the account, was held to be to carry the debit of the first year to the second year's account, and that of the second to the third and of the third to the fourth. The court says: "When accounts are settled yearly and the balance transferred to the new account, if no appropriation is made of the payments by the parties, they must be applied in the order of priority, so that each payment shall go to discharge the earliest debt." And this rule the court holds supersedes any claim that can be made by the sureties for the several years, if the parties have failed to designate the account to which the several payments shall be applied.²

¹ United States *v.* Linn, 2 McLean C. C. 501, 509.

² Inhabitants of Sandwich *v.* Fish 2 Gray, 298; Boston, etc., *v.* Messinger, 2 Pick. 223; Colerain *v.* Bell, 9 Metc. 499.

§ 681. **Same subject continued.**—If a tax collector who has given bonds successively for two years, is in default as to the money collected during the first year, and to make good that default, pays to the treasurer money collected under the obligation of his second bond, the sureties on that bond will be responsible for the deficit caused thereby, unless the treasurer when he received the money was aware of the source whence the fund was derived. Although the law, when it falls to its lot to appropriate payments, will not suffer the revenue received under one term to be applied to a defalcation incurred under another term, yet if the officer himself makes the misappropriation, and the money is received in good faith by the proper officer, the misappropriation cannot be avoided, and is binding on the sureties.¹

§ 682. **Liability of sureties for money collected without suit.**—It is not, at common law, the duty of a sheriff or other ministerial officer to collect money on claims put into his hands, without suit. It is his province to act only upon judicial process. Whatever he may do as a collector without judgment and execution, he does as agent of the creditor, and his sureties on his official bond are not liable for his defaults. By statute, however, in many of the states, among others Missouri, it is made the official duty of such officers to collect without suit, if they can, such claims as may be put into their hands for collection, and their sureties on their official bonds are made responsible for the due discharge of their duties in this respect. It is required by the statute of Missouri that such officers shall give receipts for such claims, but the omission of the receipt does not operate to discharge the surety.²

This practice prevails generally throughout the states. It is customary to make sheriffs and constables agents for the

¹ *State use, etc., v. Smith*, 26 Mo. 226, 230; *Inhabitants, etc., v. Bell*, 9 Metc. Mass. 499; *State v. Smith*, 32 Mo. 524

² *State v. Grupe*, 36 Mo. 365.

collection of debts, to place notes and accounts in their hands with instructions to obtain payment, "peaceably if they can, forcibly if they must." Where this practice prevails the sureties of the officer are, by express statute, made liable for the due discharge of the duty. In the absence of such statutes, the surety being bound only for the faithful discharge of duties which his principal is required by law to perform, is not responsible for his conduct in fulfilling obligations of this character. In Kentucky, by statute, the sureties of a constable are liable for claims put into the hands of their principal for which he might legally obtain and execute process, but not for those which he could not officially collect by legal process, such, for example, as are beyond the jurisdiction of a justice of the peace, the constable's authority to execute process being limited to that issued by justices.¹

§ 683. Liability of a surety on an official bond is direct and not collateral. — It is not generally necessary in order to obtain a judgment upon an official bond against the sureties, that a judgment against the principal be produced in evidence, or that he be a party to the suit against the sureties. Their liability is direct and not collateral, their bond is joint and several, and all that is necessary to obtain a judgment against them, is to show a breach by the principal, of the condition of the bond, for their undertaking is that such a breach should not occur, and it is immaterial whether the principal is before the court or not.²

§ 684. Proceedings to require new bond and surety from officer — Essentials. — The statutory jurisdiction of courts to require from officers the execution of new bonds is special and summary, and consequently everything neces-

¹ Commonwealth *v.* Sommers, 3 Bush, 555; Commonwealth *v.* Peters, 4 Bush, 403.

² Cassidy *v.* Trustees, etc., 105 Ill. 560.

sary under the statute to authorize the court to act, must appear upon the record. A proceeding of this sort cannot be instituted by a judge or court on his, or its own motion. It must appear upon the record who is the old security who seeks to be released, and demands that a new bond be given, the day upon which the new bond must be given, and all the facts upon which the judgment of the court is founded, as for example, if the judgment is that the office be vacated, the fact that the officer after due citation failed upon the proper day to furnish the sufficient bond required by the statute. Proceedings of this character, being summary and penal, can only be supported by record evidence, that all the requirements of the statute were fully complied with, and unless that is done the office is not vacated.¹

§ 685. Surety — Effect of death of principal on liability of — Duty and responsibility of administrator. — The death of an administrator who has not settled his accounts, closes the trusts for which his surety on his administration bond is liable. The latter is then bound to discharge whatever liability rested upon his deceased principal. His responsibility is not contingent or conditional, and it is in no degree affected by any adjudication in any judicial proceedings to which he is not a party.² He is not bound by any settlement made with the probate court by the administrator *de bonis non*, or by the administrator of his principal. There is no privity between him and either of them, and whatever they may do is, as to him, *res inter alios acta*. No decree which might be rendered in a court of equity against the personal representative of his principal is any evidence whatever against him.³ The surety of an executor

¹ Caskey *v.* State, 6 Ala. 193.

² Martin *v.* Ellerbe, 70 Ala. 326, 334; Fretwell *v.* McLemore, 52 Ala. 124; McDowell *v.* Jones, 58 Ala. 25.

³ Jenkins *v.* Gray, 16 Ala. 100; Gray *v.* Jenkins, 24 Ala. 516; Howard *v.* Howard, 26 Ala. 682; Stovall *v.* Banks, 10 Wall. (77 U. S.) 583.

or administrator, is bound by judgments and decrees rendered against his principal, such judgment or decree is at least *prima facie* evidence against the surety; but judgments or decrees against the administrator of the principal, are not evidence at all against the surety, because the latter has is in no manner undertaken to answer for the fidelity of former. Hence it follows, that after the death of the principal, there can be no judicial ascertainment of his liability by proceedings, by or against his personal representative which will be evidence against the surety, and without such evidence no suit can be maintained on his bond. The consequence is that any proceeding, by which the liability of the surety of a deceased principal on his official bond can be enforced, must be a plenary and original proceeding by bill in equity or its equivalent.¹

§ 686. Death of surety.—Its effect on the liability of his estate. — The time when the obligation of a surety in an official bond takes effect may, under certain circumstances, become a critical question. It is held in a recent case in Indiana that the obligation of the surety on the bond becomes complete upon its execution, and is in no respect dependent upon its approval, and hence that the death of the surety after he has executed the bond, and before it has been approved by the court or officer whose statutory duty it is to pass judgment upon its sufficiency, does not operate to release the estate of the deceased obligor. The court founds its judgment upon the ground that the approval of an official bond is not required for the benefit or protection of the sureties, but of that of the obligee, that the statutory provisions for the approval of such instruments will, in an action against sureties, be regarded as merely directory, and adds that a complaint in such an action will not be bad though it omits to aver that the bond was approved at all.

¹ *Martin v. Ellerby*, 70 Ala. 326, 835.

"The fulfillment of the purposes for which such a bond is required should not," the court says "be dependent upon the acts or omissions of other officers."¹ This ruling is undoubtedly the law of Indiana, but it may be submitted, with great deference, that an official bond is a deed; that by well settled principles of law, a deed is incomplete until it has been accepted by the grantee, either actually or by implication; that whenever the approval of a statutory bond is required as a condition to the title of an office, the approval stands in the place of acceptance, especially as a refusal to approve necessarily vacates the bond; that therefore the bond is imperfect and contingent until it has been accepted by the approval of the proper court or officer. The question is then presented, can the imperfect, inchoate, and conditional obligation of a surety be perfected and made absolute after his death by the action of the obligee?

§ 687. Same subject continued. — While it is very true that the approval of an official bond is intended for the benefit of the state or other obligee, it is equally true that it is intended to be, and is a condition precedent to the existence of the official relation under which only the obligation of the bond can become operative. As such the approval must necessarily stand in the place of an acceptance, but the question then arises, when, in contemplation of law the delivery takes place. If, as is usual, the surety signs the bond and leaves it in the hands of the principal obligor to deliver for himself and his sureties, to the proper court or officer, the surety does not deliver the bond to the principal as a stranger to hold for the obligor. If that were the proper construction, the delivery would be complete although the surety should die before the acceptance by the obligor.²

¹ *Mowbray v. State*, 88 Ind. 324, 326; citing, *Brandt's Sure. & Guar.*, § 442 *et seq.*; *State v. Cromwell*, 7 Blackfd. 70; *State v. Blair*, 82 Ind. 818.

² *Mather v. Corliss*, 103 Mass. 568; *Stephens v. Rinehart*, 72 Penn. St. 434; *Kingsbury v. Burnside*, 58 Ill. 310.

That, however, is not the proper construction of the transaction, the surety who signs a bond presented to him by his principal does not thereby deliver his deed to a stranger to hold for the obligee, but constitutes his co-obligor his agent to deliver the instrument at the proper time to the obligee. If, under these circumstances, the surety dies before his agent has completed his trust, his death operates a revocation of his agent's power to deliver the deed at all.¹ And a deed cannot become effective by delivery until some act has been done by the grantee equivalent to acceptance. In a very thoroughly considered case in Illinois, it has been held, after a full examination of all the authorities, that delivery and acceptance must be mutual and concurrent acts.² From these considerations, it is believed, that if a surety in an official bond dies before the bond has been accepted and approved by the court or officer, to whom is committed by statute the duty of passing judgment upon its sufficiency, his estate cannot be held liable upon the bond.

The well settled rule that acceptance will be presumed when a contract is clearly to the advantage to the grantee or obligee of the deed or bond is wholly inapplicable. The official bond when delivered must stand the scrutiny of the approving officer. It is *not* manifestly to the advantage of the obligee, for it may be that the sureties are men of straw, in which case it would be rejected and of course become void. The execution and delivery of the bond, therefore, is a mere offer to make a contract, and if the obligor dies, his death before its acceptance is a revocation of his offer, otherwise it would be competent for

¹ 1 Bacon Abridg., Authority E.

² Hulick *v.* Scoville, 9 Ill. 159, 190; Bell *v.* Farmers' Bank, 11 Bush, 34; Townson *v.* Tickell, 3 Barn. & Ald. 36; Young *v.* Guilbeau, 3 Wall. (70 U. S.) 636, 641; Jackson *v.* Phipps, 12 Johns. 422; Wilsey *v.* Dennis, 44 Barb. 359; Fonda *v.* Sage, 46 Barb. 123; Foster *v.* Beardsley, 47 Barb. 513; Richards *v.* Jackson, 6 Cowen, 617; Church *v.* Gilman, 15 Wend. 658; 30 Am. Dec. 82.

an approving or accepting officer to make a bargain with a dead man.

§ 688. When an official bond takes effect—Ruling in Illinois.—In Illinois, the question, when an official bond takes effect with reference to the obligation of its sureties, so far as it concerns one class of officers, justices of the peace, is fully settled, and the same line of reasoning applies with equal force to all other classes. It is held in that state, that when the bond was executed by the parties, and delivered to the proper officer for his approval, it became obligatory and remained so, unless it was actually disapproved by him. His mere non-action on the subject did not deprive the justice of his power to act, nor did it absolve his sureties from their undertaking for his fidelity. And the sureties continue liable so long as their principal continues to act, without reference to the regularity of his election, his commission, or his eligibility, and they are estopped by their bond from denying that he is a *de jure* officer.¹

§ 689. Sureties — Judgment against — for the penalty of the bond and not for more — When for interest.—It is very clear as a general rule, that judgment cannot be rendered against sureties for a greater amount than the penalty of the bond. The proper judgment in such a case is for “the aforesaid debt,” *i.e.*, the penalty, but to be discharged by the payment of the damages assessed, if their amount is less than the penalty.² Sureties cannot be held liable for interest beyond the penalty of the bond, except for such interest as accrued from their own default in unjustly withholding payment after having been notified of

¹ *Green v. Wardwell*, 17 Ill. 278.

² *Farrar v. United States*, 5 Pet. (30 U. S.) 373, 889; *s. c.*, 4 *Myers' Fed. Dec.*, §§ 489, 490.

the default of their principal.¹ If there has been no previous, express notification, interest is only allowed from the issuance of the writ. Prior to that, there could be no default of the surety as there is no notice to him that his principal had committed a breach of the bond.² And sureties are only bound to the extent of the obligation expressed in their covenants, unless they are themselves guilty of default, or appear and make defense, in which case they become responsible for costs, and sometimes for interest by way of damages for delay of payment.³ In replevin bonds it has been held in Massachusetts, judgment should be rendered for interest from the demand.⁴

§ 690. Surety—Obligation of principal to indemnify.—The principal in an official bond is under a legal obligation to indemnify his surety, and this obligation arises at the moment the bond is executed, and not when the surety is compelled to discharge a default for which his principal is liable in the first instance. The duty to indemnify the surety against loss antedates the loss itself, which is not the origin of the liability, but only the measure of the indemnity. Consequently a surety may, without awaiting suit and judgment, lawfully pay the debt of his principal

¹ *United States v. Hills*, 4 Clifd. C. C. 618 623; *s. c.*, 4 Myers' Fed. Dec., § 495; *Lyon v. Clark* 8 N. Y. 155; *Welch v. Clarkson*, 6 Term. 304; *The Northumbria*, 3 L. R. Adm. & Eccl. 11; *Ives. v. Merchants' Bk.*, 12 How. (53 U. S.) 164.

² *McGill v. Bank*, 12 Wheat. (25 U. S.) 514. See, also, *Bank of the United States v. McGill*, 1 Paine C. C. 670; *United States v. Curtis*, 10 Otto (100 U. S.) 119.

³ *The Wanata*, 5 Otto (95 U. S.), 612. See, also, *The Volant*, 1 W. Rob. 883; *The John Dunn*, 1 W. Rob. 160; *Gale v. Laurie*, 5 Barn. & Cress. 156.

⁴ *Leighton v. Brown*, 98 Mass. 516. See, also, *McCluskey v. Cromwell*, 11 N. Y. 593; *Bank v. Smith*, 12 Allen, 252; *Brangwin v. Perrott*, 2 W. Blackst. 1190; *McClure v. Dunkin*, 1 East, 436; *Hefford v. Alger*, 1 Taunt. 220; *Clark v. Bush*, 3 Crow. 158; *Mower v. Kip*, 6 Paige, 88; 29 Am. Dec. 748. See, also, *Van Renssalaer v. Jewett*, 2 N. Y. 140; *Leggett v. Humphries*, 21 How. (62 U. S.) 75; *Abbott v. Wilmott*, 22 Vt. 437; *Evans v. Beckwith*, 37 Vt. 285; *Simmons v. Almig*, 103 Mass. 36.

for which he is bound, unless his liability is contingent and conditional, or unless he has been notified by his principal of some good reason why the particular debt or liability should not be paid. When the surety has paid a demand against his principal, *his* claim for indemnity is a legal demand, although the debt which he paid was purely equitable, and if the payment be made without suit, and the liability of the principal be denied, the burden is of course upon the surety, he must prove that his principal was liable; and for this purpose he is entitled to use, if necessary, all the usual processes of courts of equity, may file a bill, and have an account taken and assets marshalled, etc.¹

§ 691. Rule as to indemnity of sureties — Contribution between co-sureties — As between co-sureties the rule is that any indemnity received from the principal by one surety enures to the benefit of all equally, and the surety obtaining such indemnity becomes trustee for his co-sureties in common and equally with himself. A distinction, however, is well taken between the case of an indemnity *after* the obligation has been incurred, and one stipulated for and given, as a condition or inducement, *before* the execution of the bond or other contract. In the latter case the more cautious and provident surety is entitled to the full benefit of the fund secured by his foresight, and his securities can claim only the surplus of it after his liability has been fully extinguished.

It need hardly be said that the utmost good faith is essential to support a transaction of this character, for if it is tainted with fraud, or materially lessens the ability of the principal to indemnify the other securities, it will be construed as a provision for all the sureties, and the favored one will be held in equity to be a trustee for the others.

¹ *Martin v. Ellerbe*, 70 Ala. 326, 336; *Mauri v. Heffernan*, 13 Johns. 58; *Craig v. Craig*, 5 Rawle, 91; 24 Am. Dec. 390.

No such result will follow when the indemnity is given with the knowledge and consent, express or implied, of the co-security.¹

§ 692. When sureties may join in an action against their principal. — When sureties on the official bond of a defaulting officer have paid a given sum to be released from their liability, each of them contributing a portion of the money so paid, they are entitled to bring a joint action against their principal for the money paid by them. It is true, that when two or more persons have several and separate causes of action against a party, which all grow out of the same transaction, they cannot nevertheless unite in action against him; but where the liability of the parties is joint and several, and they adjust their responsibility with the common creditor by paying a gross sum for the release of *all* of them, the rule does not apply, all of them being united in making the payment, that payment is the cause of action, and for that reason they can be joined as plaintiffs against their common principal and debtor.²

§ 693. Liability of sureties for an escape — Bastardy. — The escape of a prisoner from the lawful custody of an officer, is a breach of the latter's official bond. This is equally true when the prisoner is in custody on a charge of bastardy as in other cases. Bastardy proceedings are (in Indiana) special statutory civil proceedings, but not strictly civil actions, and the rules which measure the liability of an officer suffering an escape in ordinary civil

¹ Scribner *v.* Adams, 73 Me. 541; Moore *v.* Moore, 4 Hawks, 358; *s. c.*, 15 Am. Dec. 526, text and note; McMahon *v.* Fawcett, 2 Rand. 514; *s. c.*, 14 Am. Dec. 796; Deering *v.* Lord Winchelsea, 2 Bos. & P. 270; Hensdill *v.* Murray, 6 Vt. 136; Messer *v.* Swan, 4 N. H. 481; Gould *v.* Fuller, 18 Me. 366; Seibert *v.* Thompson, 8 Kans. 65; Steele *v.* Mealing, 24 Ala. 285; Miller *v.* Sawyer, 30, Vt. 412; McCune *v.* Belt, 45 Mo. 174; Hartwell *v.* Whitman, 36 Ala. 712; Smith *v.* Conrad, 15 La. Ann. 519; Hinsdell *v.* Murry, 6 Vt. 136; Leary *v.* Cheshire, 3 Jones Equity, 170; Low *v.* Smart, 5 N. H. 353.

² Riser *v.* Cullen, 27 Kans. 339.

actions, do not apply to bastardy cases. In those cases the offender must pay the penalty adjudged against him, or suffer imprisonment, and consequently the responsibility of the officer is more stringent than in ordinary cases of escape from custody upon civil process. If judgment has been rendered against the offender, the officer, through whose negligence he has escaped, must pay the judgment and costs, and his sureties on his official bond are liable for the amount. The fact that the offender is insolvent, is no excuse for the officer or his sureties, for the alternative of imprisonment was especially provided to meet cases of that description. And it is equally inadmissible to show or attempt to show, that the defendant was innocent of the wrong laid to his charge. And if the judgment is by default after the escape, it fixes the liability of the officer and his sureties.¹

§ 694. Liability of the surety of a treasurer. — It is well established that a public officer who is required to give bond for the proper payment of money that may come to his hands as such officer, is not a mere bailee of such money, exonerated by the exercise of ordinary care and diligence; but that his liability is fixed by his bond, and that the fact, that the money was stolen from him without his fault, does not release him from his obligation to make such payment. The loss of money by theft or otherwise, is no excuse for non-performance. This rule is founded on the nature of a treasurer's contract, and upon considerations of public policy.²

¹ Lakin *v.* State, 89 Ind. 68; State *v.* Hamilton, 33 Ind. 502; State *v.* Mul-
len, 50 Ind. 598; Smith *v.* Commonwealth, 59 Penn. St. 320; Karch *v.* Com-
monwealth, 8 Penn. St. 269; Snyder *v.* Commonwealth, 1 Penn. (Penrose
& Watts) 94.

² Halbert *v.* State, 22 Ind. 125, 182; Muzzy *v.* Shattuck, 1 Denio, 233;
Inhabitants of Hancock *v.* Hazard, 12 Cush. 112; United States *v.* Prescott, 3
How. (44 U. S.) 578; Commonwealth *v.* Conely, 8 Penn. St. 372; State *v.*
Harper, 6 Ohio St. 607.

§ 695. Liability of sureties for illegal act of tax collector.—The sureties of a tax collector on his official bond, are liable for his wrongful act in seizing goods to enforce the payment of taxes illegally assessed, upon property which is not liable to taxation. The officer is bound to know the law, and if he executes process which is void, emanating from a court or officer having no jurisdiction, he acts at his peril and will not be protected. And in like manner if he acts upon an illegal assessment, the illegality of which is apparent on the face of the tax books, he is equally without excuse or justification. Seizing goods in either case by the officer is a *tort* which is not merely a private trespass, but a breach of his bond, and for it his sureties are liable.¹

§ 696. Liability of sureties of a deputy sheriff.—A distinction and a difference.—The sureties of a deputy sheriff are responsible to the high-sheriff, on their bond, for all acts done by their principal in his official capacity. This is, of course, familiar law, but questions sometimes arise whether the acts charged are really official, or not, whether in performing them the deputy acts as deputy, or under express orders as the servant or agent of the high-sheriff. In the former case the deputy having, and being presumed to exercise a discretion, the sureties are liable, in the latter they are not. Where a sheriff directed his deputy to levy upon certain specific property without more, it was held that in making the levy, the deputy acted as deputy sheriff and exercised his official discretion, and consequently his sureties were bound. The court says that

¹ *State v. Shacklett*, 37 Mo. 280, 285; *State v. Moore*, 21 Mo. 160; *People v. Schuyler*, 4 N. Y. 178; *Archer v. Nobb*, 3 (Greenl.) Me. 418; *Harris v. Hanson*, 11 Me. 241; *Cormack v. Commonwealth*, 5 Binn. 184; *Commonwealth v. Stockton*, 5 Mon. (Ky.) 192; *Phillips v. Harris*, 3 J. J. Marsh. 122; 19 Am. Dec. 166; *Patton v. Commonwealth*, 4 J. J. Marsh. 202; *Forsythe v. Ellis*, 4 J. J. Marsh. 298; 20 Am. Dec. 218.

nothing short of very particular and positive instructions in a given case can change the character and responsibility of the deputy.¹

§ 697. Liability of sureties when the obligations of the bond exceed the requirements of the law. — It sometimes happens that an official bond imposes greater liabilities than are required by the law. In such a case both principal and surety are liable to the full extent of the terms of the bond, unless such a construction is forbidden by statute, or unless a contrary intention on the part of the obligors be shown. While it is true that courts will not imply a responsibility in excess of that which the law imposes, it is equally clear that if the intention to assume the additional liability be plain and unambiguous, that liability will be enforced. It should, however, be added that if a superior officer exacts from his subordinate, conditions which the law does not authorize, and the assumption of those obligations are made essential to his induction into office at all, the subordinate officer and his sureties are held to act under duress, and the illegal and extra-official obligations contained in the bond are null and void.²

§ 698. Virtute officii and colore officii — Rule as to sureties. — Whether the sureties of an officer are liable for his acts done *colore officii*, or only for those done in the performance of his assured functions, and *virtute officii*, is a question upon which the authorities are neither clear nor uniform. Lord Kenyon distinguishes the two classes

¹ Tuttle *v.* Cook, 15 Wend. 274.

² Philadelphia *v.* Shalleross, 14 Philad. 135; Chelmsford Co. *v.* Demarest, 7 Gray, 4; Hassell *v.* Long, 2 M. & S. 363; Curling *v.* Chalken, 3 M. & S. 510; Dover *v.* Twombly, 42 N. H. 67; Hoboken *v.* Harrison, 30 N.J. L. (1 Vroom) 79; Woolwich *v.* Forrest, Pennington 84; Angero *v.* Keen, 1 M. & S. 390; United States *v.* Hodsdon, 10 Wall. (77 U.S.) 395; Commonwealth *v.* Wolbert, 6 Binney, 2; Saeltzer *v.* Gunther, 2 Miles, 86; Bank *v.* Cresson, 12 Serg. & R. 306.

of acts thus:¹ "That a constable acting *colore officii* was not protected by the statute where the act committed was of such a nature that the office gives him no authority to do it, in the doing of that act he is not to be considered as an officer; but where a man doing an act within the limit of his official authority, exercises that authority improperly, or abuses the discretion placed in him, to such cases the statute extends." In other words, the first of these classes of acts are done *colore officii*, and in doing them the officer "is not to be considered as an officer" at all; the second class of acts are done *virtute officii* and for these, the authorities agree, that the sureties on the officer's official bond are responsible. Following Lord Kenyon's *dictum*, the supreme court of Wisconsin decided that the sureties of an officer were not liable for his acts done *colore officii*, and that seizing goods "claiming" to have (not having) a writ of replevin was an act of that character.² In a New Jersey case the court goes much further and decides that the surety is not liable on an official bond for the seizure by an officer of the property of one person upon legal process against another, and that such a seizure is an unofficial act done *colore officii*.³ This phase of the question, however, is fully discussed in other parts of this work, to which the reader is referred.⁴

§ 699. Same subject continued. — In Missouri, it has been decided that when an act is within the limits of the officer's authority, and he is required by his duty to act,

¹ *Alcock v. Andrews*, 2 Espinass 542, note; referring to Stat. 24 Geo. II. Ch. 44, §, 8.

² *Gerber v. Ackley*, 37 Wis. 43. See, also, *Seeley v. Birdsall*, 15 Johns. 267; *Morris v. Van Voast*, 15 Wend. 283; *State v. Mann*, 21 Wis. 684; *Griffith v. Smith* 22 Wis. 646; *Battis v. Hamlin*, 22 Wis. 669; *Commonwealth v. Cole*, 6 B. Monr. 250.

³ *State v. Conover*, 28 N. J. L. 224.

⁴ See *ante*, § 303, and cases cited under that section especially *Lammon v. Fensier*, 111 U. S. 17, 22.

his misfeasance as well as his non-feasance is a breach of his official bond and his sureties are liable. But it must be remembered that the condition of his bond is that he shall perform the duties of his office, not that he shall avoid the commission of wrongs. A police officer, therefore, who, without warrant or authority of law, arrested a citizen and imprisoned him, was held to have committed no breach of his official bond or subjected himself and his sureties to an action upon it. "The act done," said the court, "was not within the scope of the bond." Thus, though it was done *colore officii*, the sureties are not liable.¹ In Indiana, where the statute makes the surety liable for "the misfeasance, malfeasance, non-feasance or default of such officer in his official capacity," it was decided that a surety was liable when the officer, having seized property of the principal in satisfaction of the execution in his hands, wasted it and then seized the property of the execution surety. "The rule on this point is," the court says, "that if the act done by the officer is performed under color of his office, his sureties are responsible."² In Massachusetts there is a like ruling in a case in which a constable executed a writ illegal upon its face, being for a sum above the amount, to which by law his powers were limited. The court said that he acted *colore officii*, was responsible to third persons, because the taking was a breach of his official duty, and that his sureties were liable for his act.³

§ 700. Same subject continued. — In Virginia, the sheriff is *ex-officio* public administrator, and to him is committed the charge of all estates upon which other persons will not, or do not, administer, and the sureties on his

¹ State ex rel. *v.* McDonough, 9 Mo. App. 63; citing, *Ex parte Reed*, 4 Hill (N. Y.), 572. See, however, *People v. Schuyler*, 4 N. Y. 187.

² State *v.* Druly, 3 Ind. 431.

³ Lowell, City of, *v.* Parker, 10 Metc. (Mass.) 309; 43 Am. Dec. 436; *Grinnell v. Philips*, 1 Mass. 530.

official bond are liable for his acts and defaults as such administrator. In a case in which he was administrator with the will annexed, two questions were raised. Whether the high-sheriff and his sureties could be held responsible for a default of the deputy sheriff in not paying over rents collected by him on the lands of the decedent, which neither the deputy nor his principal had the right to collect, and whether the sureties of the deputy were in such case liable to the high-sheriff. It was resolved in the affirmative on both points, the court holding that, although under the will of the decedent, the sheriff may not have been authorized to receive the rents, yet the estate, having been committed to his charge, and his deputy having received the rents, he, the high-sheriff, was bound to account for them, being responsible *civiliter* for the acts of his deputy. And if the deputy acting *colore officii*, did receive the rents, although neither he nor his principal had any right to do so, his sureties were liable for them to the high-sheriff, who in turn with his sureties were liable to the heirs and distributees.¹

An officer who takes the goods of one person upon process in his hands against another, commits a breach of his official bond, and his sureties are liable for this act. This is pretty fully established by the weight of authority. Upon the same principle the seizure under legal process of goods which are exempt from execution, is also a breach of the officer's bond and charges his sureties. In an Iowa case of this description the court says: "The wrong was committed by color of his office a wrong which his sureties obligated themselves he would not do, and for which they should be held responsible."²

§ 701. Same subject continued. — In Alabama, the liability of officers and their sureties for acts done under color

¹ *Mosby v. Mosby*, 9 Gratt. 584.

² *Strunk v. Ochiltree*, 11 Iowa, 158. See, also, *State v. Farmer*, 21 Mo. 160; *State v. Moore*, 19 Mo. 369.

of office, has been the subject of legislation.¹ In construing this statute, the supreme court said that its object was, "to extend the remedy beyond those cases in which a wrong is done in discharge of the legitimate duties of the office to those in which a wrong is done under color of office."² In that state a justice of the peace is a bonded officer and authorized to collect money on the judgments he may render. A justice *not* having rendered a judgment against a garnishee, pretended that he had done so, collected the money and failed to pay it over. His sureties were held liable because in pretending that he had rendered the judgment, he pretended that he had legal authority to collect the money, and his doing so was a wrongful act committed under color of his office. He only, and not his sureties, would have been liable, if he had collected the money without having made the false assertion that he had rendered the judgment.³

§ 702. The liability of surety on an official bond is a debt—Conveyance to defeat it is a fraud.—It is an elementary principle that a voluntary conveyance by a party indebted, in fraud, actual or constructive, of his creditors is void. The question was presented to an Illinois court whether the contingent liability of a surety on an official bond was such an indebtedness as justified the court in regarding a conveyance which tended to defeat it, as fraudulent. It was held that it was such an indebtedness, that public policy required that it should be so regarded, and added: "In such cases it would seem right and just that courts should hold such contingent liabilities as equivalent to an actual judgment."⁴

¹ Ala. Code of 1876, § 179.

² McElhany *v.* Gilleland, 30 Ala. 183.

³ Mason *v.* Crabtree, 71 Ala. 479, 481.

⁴ Bay *v.* Cook, 31 Ill. 336, 348.

§ 703. What will charge the sureties of a public administrator.—In many of the states there is an officer charged with the administration of the estates of decedents upon which no other person will administer, who, of course gives an official bond, with suitable sureties, conditioned for the due execution of the functions of his office. To charge such securities with liability on their bond, for the default of their principal, as such public administrator, with reference to any particular estate, it is not necessary that the grant of letters of administration should describe the grantee by his official designation; it is sufficient that he in his petition applying for the position shall so describe himself. If he does so, and the letters are granted in response to that petition by the ordinary, or court of probate, such grant is held to be to him officially and not individually.¹

§ 704. Sureties not liable on bond executed by them when it was imperfect.—Whether a bond executed by sureties before their principal had signed it, with material parts in blank, was valid or not, was a question in a case before Chief Justice Marshall, in 1822. The sureties executed a printed blank form which recited no names, no date, no penalty, no office, no duties. The bond was afterward filled up as the bond of a paymaster, and the penalty, \$7,000 inserted in it, it was executed by the principal and accepted by the proper authorities of the United States. Chief Justice Marshall held that the bond was void, but “with much doubt, and with a strong belief that this judgment will be reversed.” This, however, was not the case, for no appeal was taken.²

¹ *Mitchell v. Hecker*, 59 Cal. 558.

² *United States v. Nelson*, 2 Brock. 64, 75. See, also, *Speake v. United States*, 9 Cranch (13 U. S.), 28.

CHAPTER XX.

THE STRICTISSIMI JURIS RULE.

- SECTION 710.** Liability of sureties — *Strictissimi juris* — Meaning of the rule, and illustrations of it.
711. New duties imposed by law on officer — Whether surety is liable for their performance.
712. What does "according to law" mean? — Construction of the phrase under the *strictissimi juris* rule.
713. Same subject continued.
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715. The liability of a surety cannot be continued by legislative extension of principal's term.
716. Limitation of liability on official bond to the term for which it purports to be executed.
717. Construction of official bond — Liability of surety — General words cannot enlarge a liability fixed by particular words.
718. Obligation of surety cannot be enlarged by the obligee, or by operation of law.
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SECTION 730. Reasonable construction of the *strictissimi juris* rule.

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732. **Distinct and merged offices — Sureties liable when two offices have been merged into one before the execution of the bond.**
733. **Sureties cannot be discharged from liability for the default of their principal, by the laches or negligence of other officials of the same corporation.**
734. **Surety — When bound for defalcations existing at the execution of the bond.**
735. **When surety is not released by the obligee's omission to avail himself of a statutory remedy against the principal obligor.**
736. **For what acts of malfeasance of principal, a surety is bound — For what he is not bound.**

§ 710. Liability of sureties — Strictissimi juris — Meaning of the rule and illustrations of it. — It has been repeatedly said in the course of this work that the liability of sureties is *strictissimi juris*, and cannot be extended by implication beyond the scope of their engagements, or the reasonably necessary import of the language of their bonds. This rule is, in its general terms at least, so well settled that it may be regarded as axiomatic.¹ The rule being so general, of course there has been, and must needs be much diversity in its application to infinitely varying circumstances. What is the "reasonably necessary import," of a given official bond is often a question involving some perplexity, how far its obligation includes duties imposed by subsequent legislation, and whether such duties fall within the scope of the officer's bonded engagements, or are germane to his conceded and acknowledged obligations, are often points of difficulty. Thus in an action

¹ It is hardly necessary to cite authorities for such a proposition, but the following cases may be referred to: *United States v. Cheeseman*, 8 Sawy. C. C. 424, 434; *Miller v. Stuart*, 9 Wheat. (22 U. S.) 703; *United States v. Boyd*, 15 Pet. (40 U. S.) 207-9; *Leggett v. Humphreys*, 21 How. (62 U. S.) 76; *Morton v. Thomas*, 24 How. (65 U. S.) 317; *Smith v. United States*, 2 Wall. (69 U. S.) 235; *Myers v. United States*, 1 McLean C. C. 493.

against an assistant United States treasurer for delinquency as internal revenue stamp agent, the bond had been conditioned in accordance with the statute creating the office, passed long before there were any such stamps in use, and did not refer to any section of the act of 1864 which related to the duties of an assistant treasurer as stamp agent. The court held that the duties of stamp agent were not included in the obligations of the bond; that the fact that the secretary of the treasury accepted the bond which did not provide for or refer to the duties of stamp agent, was conclusive that those duties were not among the obligations secured by the instrument.¹

§ 711. New duties imposed by law on officer — Whether surety is liable for their performance. — The question is frequently raised, whether it is competent for a legislature to add to the jeopardy of a surety after he has become responsible on the bond of an officer, by imposing upon that officer new duties involving the receipt and disbursement of money, and declaring that the officer and his sureties shall be responsible upon their official bond, for the due discharge of these additional duties. The question was presented to the supreme court of Mississippi in a recent case, in which the legislature had by special act required the clerk of a court to collect license fees of attorneys and docket fees; duties which had not theretofore been discharged by the clerk. The court held that the true rule was, that if the new duties imposed were of the same kind and nature of those usually incident to the office, the sureties were liable for his default in the discharge of such duties, but if they were alien to his ordinary official functions, his sureties were not responsible. Applying this rule to the case in judgment, the court said that the collection of rev-

¹ *United States v. Cheeseman*, 3 Sawy. C. C. 424, 434; *s. c.*, 4 Myers' Fed. Dec., § 482.

enue was not an appropriate duty for a clerk of a circuit court, and could not be justly said to have entered into the consideration of his sureties, when they became responsible for him, and that not having contemplated the assumption of any such obligation they were not bound for his default.¹

§ 712. What does "according to law" mean — Construction of the phrase under the strictissimi juris rule. — In this connection it may be remarked that the words, "according to law," which are in general use in referring to the duties of officers and the obligation of their bonds, have rather a broad significance. They are held to mean, according, not only to the law in force at the time the contract was executed and the official bond signed, but all the laws in force at any time during the continuance of the term of office, whether passed before or after the execution of the bond. Upon this principle, in Ohio, the sureties of a county treasurer were liable for city funds for which their principal had been made responsible under a statute enacted during his term of office, and after the execution of his official bond. When the bond was executed there was a city treasurer, whose duty it was to take charge of the city funds; that office was abolished and those funds turned over to the county treasurer. The court says: "The power of the legislature to modify the duties of the officer during his term cannot be doubted, and the exercise of such power must have been within the contemplation of the parties at the time the bond was executed."² This ruling does not conflict with that in the Mississippi case just cited. In this, it will be observed that the new duties imposed upon the officer were in nature and character identical with those for the performance of which he was already bound. In the Mississippi case it was otherwise. It is the duty of a treas-

¹ *Denio v. State*, 60 Miss. 949.

² *Dawson v. State*, 38 Ohio St. 1; *King v. Nichols*, 16 Ohio St. 80. See, also, *People v. Vilas*, 36 N. Y. 459.

urer to keep money safe, the new law only gave the Ohio treasurer additional money to keep safe. It is the duty of a circuit court clerk to keep records, the Mississippi statute imposed upon him the functions of a tax collector as well.

§ 713. Same subject continued. — It is undoubtedly the law that as between private parties, any alteration in the obligation or contract, in respect of which a person has become security, without the consent of such surety, extinguishes his obligation and discharges him; and this whether the alteration works him an injury or not.¹ And the reason is that the surety has never made the contract upon which it is sought to charge him, and, further, that the contract which he did make has been extinguished by the unauthorized alteration. Upon these points there can be but little controversy. An official bond, however, stands upon a somewhat different footing, the surety is usually bound that his principal shall perform the duties of his office, "according to law," and therefore it has been held that the obligation of the surety contemplates and includes all laws germane to the matter, that may be in force during the term of the officer, and the currency of the bond. In a New York case, in 1867, the subject is thoroughly canvassed and the court arrives at the conclusion that where, by statute, during the currency of a bond, additional duties of the same nature and character as those originally undertaken, are imposed upon the officer, his sureties are liable on their bond for the due discharge of those duties.²

In a later case in the same state the subject is fully considered. The court recognizes the distinction above stated between the obligations assumed by sureties upon the bonds of public officers, and by those liable only by private con-

¹ *Wherton v. Hall*, 5 Barn. & C. 269; *Bangs v. Strong*, 4 N. Y. 315.

² *People v. Vilas*, 36 N. Y. 459. See, also, *White v. Fox*, 22 Me. (9 Shepley) 341; *People v. McHatton*, 7 Ill. 216; *Kindle v. State*, 7 Blackfd. 586; *Coulter v. Morgan*, 12 B. Monr. 278; *Mooney v. State*, 13 Mo. 7.

tract. In the former, it is said the contract of the parties has reference to the acknowledged power of the legislature to vary and change the power and duties of the officer. The rule is, therefore, stated to be that unless the territorial jurisdiction of the officer be enlarged (or, it may be presumed, changed altogether, as from one county to another), or the general nature or functions of his office altered, the surety will not be discharged on account of changes made, by competent legislative authority, in the official duties, after the execution of the contract. In any case, however, it was said, the surety remains bound for the due performance of the original duty for which he became bound under the law in force when the contract was executed. The bond will still remain a security for what it was first given to secure.¹

§ 714. Surety of officer is released by subsequent enlargement of his territorial jurisdiction. — It has already been intimated that the surety of an officer will be discharged by a change made subsequent to the execution of his bond in the general nature and character and scope of his official functions, and upon the same principle by an enlargement of the district in which his duties are to be performed. The strictness with which this latter rule is applied, will appear in a case in which a person had been appointed and given bond as tax collector for eight townships, and afterwards a *ninth* township was by competent authority added to his district. The supreme court of the United States decided that the alteration extinguished the original contract by the substitution of a new one, and that the surety, not having assented to the

¹ *Supervisors, etc., v. Clark*, 92 N. Y. 391. See, also, *Gaussens v. United States*, 7 Otto (97 U. S.), 584; *Commonwealth v. Holmes*, 25 Gratt. 771; *Hatch v. Inhabitants, etc.*, 97 Mass. 533; *United States v. Kirkpatrick*, 9 Wheat. (22 U. S.) 720. See, however, upon the last point in the text, *post*, § 714; *Miller v. Stewart*, 9 Wheat. (22 U. S.) 680, 704, 705.

alteration, was not bound by it, and was discharged from the moment of the addition of the ninth township to the district. And the change thus operating as an extinguishment of the contract, it follows, of course, that the surety was not liable after the change, for taxes collected in the eight districts. In this it will be observed the ruling differs somewhat from the *dictum* in the New York case just cited,¹ that in any case the surety remains bound for the performance of the original duty, for which he became bound under the law in force when the contract was executed. Mr. Justice Story's ruling, it is believed, is more in accord with legal principles; that the appointment, office, or duty is an entire thing, that the alteration makes it a different thing, and the surety had not contracted as to that thing at all. The *strictissimi juris* principle is very fairly applicable to any case in which there is an attempted addition to the liability of the surety after the execution of the contract.²

§ 715. The liability of a surety can not be continued by legislative extension of principal's term.—It is not competent for a legislature, by extending the term of an officer, to continue the liability of his sureties for the period covered by the extended term. The sureties contract with reference to the law as it exists at the time they execute the bond, and that law forms part of their contract. Although they may be responsible for their principal, "until his successor shall have been elected and qualified," that liability must also be referred to the existing law. Thus a bond was given by an officer whose term, by the existing law, expired on the first day of October. After the execution of the bond the legislature extended his term to the first day of January. The court held that the sureties were not bound

¹ *Ante*, § 713; *Supervisors, etc., v. Clark*, 92 N. Y. 391.

² *Miller v. Stewart*, 9 Wheat. (22 U. S.) 680, 704, 705; *Lord Arlington v. Merrick*, 2 Saund. 412; *Pearsall v. Summersett*, 4 Taunt. 593; *Sheppard's Touchstone*, 394.

for the acts of their principal between September and January, and they were only bound so far as the qualification of a successor was concerned until the qualification of a successor who was entitled to qualify on the first of October. As there was no such successor, and in the state of the law could not be, the liability of the sureties terminated absolutely on that day. "The provision of the bond in relation to the discharge of duties subsequently imposed has no application to a case of this nature. It only applies to such duties as may be required to be performed during the period of liability fixed by the bond, and can not be construed as authorizing an extension of the period itself." In this case it would seem that in the bond was embodied a specific undertaking on the part of its obligors, that the principal should perform such duties as might thereafter be imposed upon him by law. The distinction, however, is very manifest between the duties of an officer and an extension of its term.¹

§ 716. Limitation of liability on official bond to the term for which it purports to be executed. — If an officer of a corporation is required by its charter or by-laws to give a bond with security for the due discharge of his duties, and at the proper time, and in due course of business, gives the bond, the liability of his sureties is limited to the term or time for which he had then been appointed or elected. If he is elected for one year, and at the expiration of that year is re-elected for a second year, he is thereafter in by virtue of his re-election, and not as holding over from his first term. And if no bond is required of him, or given by him, at the commencement of his second term, that fact in no degree operates to continue the liability of his sureties on his bond. "If the bond," says an English court, "may continue beyond the current year, it

¹ *Brown v. Lattimore*, 17 Cal. 93; *People v. Aikenhead*, 5 Cal., 106.

may do so for the life of the collector, for the whole time or his continuing in office. It will attach on the surety, whenever the person for whom he undertakes is in default.”¹

§ 717. Construction of official bond — Liability of surety — General words cannot enlarge a liability fixed by particular words. — The rule that a surety may stand upon the very terms of his contract, and its variation without his assent is fatal to recovery upon it, is well illustrated in a recent Philadelphia case. A person elected book-keeper of a bank, gave a bond with a penalty of \$20,000 conditioned that he “ shall faithfully execute the duties of book-keeper, and in every way faithfully and honestly administer his duties while in the employ of the aforesaid bank.” He was subsequently made teller at an advanced salary, and still later assistant cashier, without any renewal of his bond, and without any notice to his surety. While holding the two higher offices he embezzled \$128,000, and it was sought to hold his surety liable on the ground that the words “ shall faithfully and honestly administer his duties while in the employ of the aforesaid bank,” enlarged the liability of his surety, and made her responsible for his defalcation as teller and assistant cashier. The ruling of the court was that these words could not have any such operation, that general words must be restrained to the matter or person to which they refer; that the matter was to secure the bank against an unfaithful book-keeper; and that the words in question referred to his duties as book-keeper, and not to any other duties that might be assigned to him, especially any others which involved greater temptation or increased facilities for the commission of acts amounting to the breach of his bond.²

¹ Hassell v. Long, 2 Maule & S. 370; Kingston, etc., Co. v. Clark, 33 Barb. 196.

² Northwestern, etc., Bank v. Price, 14 Philad. 7.

And upon the same principle, and with the well known tender regard of the law for the due protection of sureties, it has been held that where an appointment of a collector has been made, a commission issued, and a bond executed, a limitation of time being fixed, and upon its expiration a new appointment made and commission issued, the liability of the sureties on the first bond is confined to the duration of the first commission, and further, that it is limited to the duties and obligations imposed by the laws in force when the bond was executed.¹

§ 718. Obligation of surety cannot be enlarged by the obligee or by operation of law. — The strict construction of the liability of a surety is illustrated in a great number of adjudged cases. One of the most recent is a Pennsylvania case in which it was sought to hold the sureties of a defaulting cashier liable for defaults committed by him while acting as an officer of a corporation different from the body to which his bond had been given. He was elected cashier of an inchoate bank, which was organized in anticipation of its incorporation, but which in fact was never incorporated at all, being merged after its organization, in an insurance and trust company, which had been duly chartered, but did not possess banking privileges. The principal, whose bond with security had been given to the unincorporated bank, acted as cashier of the incorporated insurance company, which persisted in doing banking business, in utter disregard of the provisions of its charter. It came to grief, and made an assignment for the benefit of its creditors, and, the cashier having become a defaulter, the assignees brought suit on his official bond given to the unincorporated banking company, which had been merged in the insurance company. The court said: “It is an established rule of law that a

¹ *United States v. Kirkpatrick*, 9 Wheat. (22 U. S.) 720.

party to a contract like that of these defendants shall not be bound beyond the extent of the engagement, which appears from the terms of the contract, and the nature of the transaction to have been in contemplation at the time of entering into it, and that his liability cannot, without his consent be extended or enlarged either by the obligee or by operation of law.¹ Hence an increase in the capital stock of a bank was held to discharge the sureties of the cashier from liability for any misconduct or mistake of the cashier, committed after any part of the increased capital was paid into the bank."² It may be remarked, however, that by a change of the character indicated, the responsibility of the surety for antecedent defaults is not abrogated, the bond is not rendered void *ab initio*, but the release of the surety takes effect only from the date of the change, and applies only to those defaults which occur after that event. When the capital stock of a bank was increased from \$300,000 to \$500,000, and afterwards to \$750,000, the sureties of the cashier were held liable for his embezzlements committed before the first increase of the stock, but not for those which occurred after that change.²

§ 719. Strict construction of bond as to surety—Distiller's bond—Limitation of surety's liability to the stipulated locality. — Another illustration of the rule that the liability of a surety is not to be extended by implication, and that he has a right to stand upon the very terms of his contract, is to be found in a ruling of the supreme court of the United States, in a case in which a distiller's bond formed the cause of action. In that bond the place where the business was to be carried on was designated,

¹ *Bensenger v. Wren*, 100 Penn. St. 500; *Miller v. Stewart*, 9 Wheat. (22 U. S.) 780; *Smith v. United States*, 2 Wall. (69 U. S.) 219; *Grocers' Bank v. Kingman*, 16 Gray, 473.

² *Grocers' Bank v. Kingman*, 16 Gray, 473, 477.

and the court decided that the surety was not liable for taxes growing out of business conducted by the distiller in any other place. The place where the business is to be carried on is of the essence of the contract, in no degree of less importance than the amount of the penalty. The *locus in quo* of distilling operations is subject to a lien in favor of the government for the amount of taxes accruing from distilled spirits, and the sureties, having, in case of emergency, the right to be subrogated to the government lien, have also a manifest interest in having that lien kept on the property in view of which they made their contract.¹

§ 720. Surety — Limitation on liability — Judicial bonds — Strict construction of a certiorari bond, and of a delivery bond. — It has been repeatedly said that a surety has a right to stand on the letter of his contract, and that the law will not create a liability against him which he has not brought upon himself by his own acts. Bonds prescribed by statute and required to be given in judicial proceedings will, in the interests of sureties, be strictly construed, and the liability of sureties upon them must be limited by their terms. Thus, a *certiorari* bond conditioned to prosecute the writ, and if the judgment below be affirmed, or *more* be recovered on a trial *de novo*, to pay such judgment, did not bind the surety to pay a judgment recovered, on a trial *de novo*, for *less* than the original judgment. There being no express provision in the bond for such a judgment, the law would not create any.²

And in an admiralty case a libel was filed against husband and wife, and the latter gave a bond with security which was duly approved, and the property was delivered to her. Upon the trial of the cause, judgment was rendered against

¹ *United States v. Boeker*, 21 Wall. (88 U. S.) 652, 659; *s. c.*, 4 Myers' Fed. Dec., §§ 638, 639.

² *Swanson v. Ball*, Hempst. C. C. 39.

the husband, but the libel was dismissed as to the wife, and an effort was made to hold the wife's sureties responsible for the property on the ground, that although the property had been delivered to the wife, it was proved that it really belonged to the husband. The defense of the sureties was that they were the sureties of the wife, that their obligation was, that *she* should perform and abide by the decree of the court against her, that no decree had been rendered against her, and that, therefore, there was no breach of their bond. And this defense was adjudged sufficient.¹

And in another admiralty case there was a stipulation in the sum of \$900, conditioned to pay such sum as might be awarded to the libellant by the final decree in the cause. The court held that the obligation of the surety was limited to the sum of \$900, and that he could not be made to pay more. And this was manifestly correct, as the stipulated \$900 was equivalent to the penalty in an ordinary bond with condition.²

§ 721. The release of one surety discharges all the others—Illustration of the rule. — The release of one surety operates a discharge of all the others. This principle is too elementary to need support from authorities. A surety has a right to stand on the precise terms of his contract, and can be held to no other or different contract. Whenever, therefore, the sureties contract together, each relies, and has a legal right to rely, upon every other to share the burden and jeopardy of the undertaking, and whatever act of the obligee releases any one of them, annihilates the contract into which the parties had entered, and discharges all the sureties. When, therefore, a county court upon the application in due form of one or more sureties on an official bond, orders the officer to give a

¹ *Jaycox v. Chapman*, 10 Bened. C. C. 517.

² *Brown v. Burrows*, 2 Blatchfd. C. C. 340.

new bond, and upon his doing so, proceeds to release the surety or sureties who made the application, such release operates a discharge of all the others.¹

§ 722. Separate and successive official bonds — Presumption. —There is always a presumption in favor of every public officer, that he has discharged his duty according to law. The *onus*, therefore, is upon the party charging him with a default to prove it, and the burden is not shifted to the officer's side of the scale until proof is made of a *prima facie* case against him. The sureties of an officer are always entitled to the benefit of this rule. Thus where an officer was re-appointed and his account showed a large balance due by him to the United States at that time, the presumption was that he had that money ready to be paid and accounted for under the second bond, and the sureties on his first bond could not be held liable for such balance, unless proof was made that he had committed a default by converting or misappropriating the fund during the currency of the first bond.²

§ 723. Surety not chargeable for unofficial act of principal —What is such an act. — When a sheriff by consent of parties, and without an order of court, makes a sale of goods which he has seized on an attachment, such sale is not an official act of the sheriff, but is the act of a private agent of the parties. The sureties on the sheriff's bond are in no respect liable for his acts or defaults in the mat-

¹ *People v. Buster*, 11 Cal. 215, 220; *Averill v. Leyman*, 18 Pick. 346; *Goodman v. Smith*, 18 Pick. 416; *Canegie v. Morrison*, 2 Metcf. (Mass.) 381; *Wiggins v. Tudor*, 23 Pick. 484; *Crane v. Ailing*, 3 Me. 423; *United States v. Thompson, Gilpin*, 614; *American Bank v. Doolittle*, 14 Pick. 123; *Tuckerman v. Newhall*, 17 Mass. 581; *Ward v. Johnson*, 13 Mass. 148; *Brown v. Marsh*, 7 Vt. 320; *Rowley v. Stoddard*, 7 Johns. 207; *Bouchand v. Dias*, 3 Denio, 238; *Davis v. People*, 7 Ill. 409; *State v. Polke*, 7 Blackfd. 27.

² *United States v. Earhard*, 4 Sawy. C. C. 245; *Bruce v. United States*, 17 How. (58 U. S.) 437. See, also, *Alvord v. United States*, 13 Blatchfd. C. C. 279.

ter of such sale, or in the payment of its proceeds to the party entitled thereto. They are liable only for his defaults while acting or professing to act in his official capacity, and not for his irregular proceedings, in effect, as a private person, and without even the color of office. Their contract does not extend to moneys which he holds as bailee or mere stakeholder.¹

§ 724. Same subject continued. — As a further illustration of the well established principle that the liability of sureties upon their bond, is not to be extended by implication beyond the terms of their contract, it may be said that the sureties of the clerk of a court are not liable for money paid into his hands by executors and administrators, there being no order of court authorizing such payment to him, and no power in the court to make such an order. It is not, in such case, the duty of the clerk to receive money from executors and administrators, and his sureties are only liable for the discharge of his official duties.²

§ 725. Sureties on official bonds not liable for personal contracts of principal relating to official business. — The sureties of an officer are not responsible for such contracts as he may make for keeping property which he has seized under legal process, and employed third persons to take care of for him. Such employment is a personal contract of the officer, and in no respect implicates his sureties. If the expense of taking care of the property is taxed in the bill of costs, and allowed to the officer, it is his own affair whether he pays his bailee or not. The latter has no right to the costs, cannot claim them in the

¹ *Governor v. Perrine*, 23 Ala. 808; *Dean v. Governor*, 13 Ala. 536.

² *Jenkins v. Lemonds*, 29 Ind. 294. See *post*, § 730; *McDonald v. Atkins*, 13 Neb. 568.

case in which they accrued, and still less can he hold liable the sureties on the official bond.¹

§ 726. When surety is not liable for the fraud of his principal. — In North Carolina the sureties of a sheriff are not liable upon their official bond for a deposit of money, made in lieu of bail, by the defendant, with the sheriff, who refused to refund it upon the defendant's offering to deliver himself into custody. In a case of this character the court denounced the action of the sheriff as a flagrant piece of oppression and fraud, but can find no warrant in the official bond which can justify it in holding the sureties liable. The ruling of the court indicates very clearly that the terms of the bond in that state are very defective, for if the sheriff was authorized to accept the deposit at all, the sureties should surely have been bound to see that it was properly disposed of.²

§ 727. Surety of sheriff — Where exempt from liability for principal's acts after the expiration of his term. — In Georgia it is the rule that the outgoing sheriff must deliver to his successor all unexecuted process. A sheriff who had failed to perform this duty, but retained in his hands and collected an execution, fourteen days after his successor's qualification, was sued, with his sureties, by the defendant who had been obliged to pay the money a second time. The sureties insisted that they were not liable for the acts of their principal after the expiration of his term, and claimed the benefit of the *strictissimi juris* rule, and this view was adopted by the court. In Georgia, by statute, contrary to the common law on the subject, the functions of the sheriff terminate absolutely with the qualification of his successor, and at that period ceases also the liability of his sureties on his official bond.³

¹ Wilson *v.* The State, 13 Ind. 341.

² State *v.* Long, 8 Ired. 415, 418.

³ McDonald *v.* Bradshaw, 2 Ga. 248.

§ 728. Liability of sureties for misconduct of principal's servants—When they are not responsible.—The *strictissimi juris* principle effectually protects the sureties of a mail contractor from actions based upon the misconduct of the officer's employes. Whether the contractor is responsible in damages to third persons, if his carrier robs the mail, is a question outside of the contract that was authenticated by his official bond; he may be liable upon principles of public policy, but his sureties are liable only upon that contract and nothing else, and they are only responsible to the obligee of the bond. This is the general rule as to sureties upon official bonds and the exceptions of the sureties of sheriffs, clerks, etc., are created by express statutory provision.¹

§ 729. Limitations of the strictissimi juris rule.—While it is certainly true that courts habitually treat the obligations of sureties with great consideration and even tenderness, nevertheless, the rule that the liability of a surety is *strictissimi juris*, does not exclude a reasonable construction of the terms of the bond, as to what constitutes a breach of its condition. Where the condition of a bond is broken by a refusal of the officer to pay over money on demand to a person legally empowered to demand it, and the question was whether there had been a demand by a legally authorized person, and a refusal to pay it on such demand, the court held that a county treasurer who had absconded and was a fugitive from justice, was so far “incapable of discharging the duties of his office” as to authorize the appointment of a suitable person to demand the money.² Nor does the *strictissimi juris* rule entitle sureties to the benefit of any special rigor in the construction of the formal parts, or the details of the execution and delivery of

¹ *McRea v. McWilliams*, 58 Tex. 328.

² *Supervisors, etc., v. Semler*, 41 Wis. 374.

the official bond. The sureties have no right to contest the validity of the bond, or their liability upon it because their names are not recited in it. The bond is sufficient, if upon a fair construction of it, the character of the instrument, the obligations which the parties respectively assume, and their relation to each other are all apparent from a reference to its terms alone.¹

§ 730. Reasonable construction of the strictissimi juris rule.—The special privileges of sureties do not exclude a reasonable construction of their obligations. The duty of a clerk of a court to receive money paid to him by a judgment debtor in satisfaction of the judgment, is well established by custom and by general law, even in the absence of a special statutory provision. Such receipt is a charge upon the officer's sureties on his official bond. This was the ruling in a Nebraska case, based in the absence of a specific statute, upon the custom of the state, the analogies afforded by the statutes providing for the amercement of clerks for non-payment of such funds in their hands, and the well established practice of ordering the payment of money into court.²

§ 731. Surety—Construction of liability must be strict but reasonable.—It is certainly true, that a surety is entitled to stand upon the precise terms of his contract, and that no liability beyond that to be deduced from the terms of the contract is to be raised by implication. The true meaning of the cases supporting this rule is, that no strained construction is to be given to the obligations of sureties, and that it is not permissible to go beyond the fair import of the terms they employ, in order to fasten upon them a liability. But in respect of their contracts the rule

¹ *Stewart v. Carter*, 4 Neb. 564.

² *McDonald v. Atkins*, 13 Neb. 568. See, *ante*, § 724; *Jenkins v. Lemonds*, 29 Ind. 294.

of construction prevails which accords a rational interpretation to the language of their agreements, so as to reach the meaning denoted by the terms they use.¹

§ 732. Distinct and merged offices — Sureties liable when two offices have been merged into one before the execution of the bond. — In the course of legislation, it sometimes happens that new duties are imposed upon the incumbents of existing offices, and that one office is merged in another, and questions very interesting to the sureties on official bonds, grow out of this species of legislation. Thus, prior to 1845, the sheriff and tax collector were distinct officers in Illinois, but in that year it was enacted that the sheriff of each county shall be *ex officio* the collector of taxes, and that his refusal to act as such should vacate his office of sheriff. The sheriff was required to execute a bond as collector, distinct from his bond as sheriff. Under this state of the law a deputy sheriff who had given bond to the sheriff, conditioned that "he shall perform all the duties required of him as such deputy sheriff" became a defaulter, for a sum of money which he had collected for taxes, and his sureties insisted that they were not liable for his defalcation so far as concerned such tax money, because the collection of taxes was not a duty which could be required of him as a deputy sheriff. The court decided, however, that the office of tax collector, was by the act of 1845, merged in that of sheriff, that notwithstanding the special bond, the sheriff, as sheriff, was tax collector, and that consequently the collection of taxes was part of the duties of *sheriff*, and could therefore be properly required of a deputy sheriff.²

¹ *People v. Breyfogle*, 17 Cal. 504.

² *Wood v. Cook*, 31 Ill. 271, 278; *People v. Edwards*, 9 Cal. 291; *Moore v. Foote*, 32 Miss. 480; *Jones v. Montford*, 3 Dev. & Bat. 73; *Amos v. Johnson*, 3 Har. & McH. 216; *Jarnigan v. Atkinson*, 4 Humph. 470.

§ 733. **Sureties cannot be discharged from liability for the default of their principal, by the laches or negligence of other officials of the same corporation.** — It is of course manifestly a default of an officer whose duty it is to receive money, to accept in lieu thereof promises to pay money. And in a recent New Jersey case it was decided that the treasurer of a building and loan association who, by the nature of his office, the rules of the association, and the terms of his official bond, was bound to collect the monthly dues of the members, and fines and penalties assessed against them, committed a breach of his bond by accepting in lieu of money for such dues and penalties, promises to pay money, and that for this his sureties were liable. And the liability of the sureties was in no degree relieved by the fact that the president and directors of the corporation connived at and approved the complaisance of the treasurer. Their doing so was a breach of their duty, which was to see that the by-laws and rules of the corporation were duly observed, and their laches in no respect justified the default of the treasurer in the discharge of *his* duty, for they had no right to absolve him from his obligations.¹

§ 734. **Surety, when bound for defalcations existing at the execution of the bond.** — The general rule is that unless a bond is retrospective in its terms, the surety is not bound for a default or defalcation committed before its execution. The surety is beyond all doubt liable for money lawfully in the hands of his principal when the bond is executed, but if he has converted the money before that time or has otherwise disposed of it, or illegally withholds it, the former surety is liable and not the latter. A surety, therefore, cannot be responsible for antecedent defaults un-

• ¹ People's, etc., Association *v.* Wroth, 43 N. J. L. 70.

less the bond is retrospective in its terms, given in substitution for the preceding bond, or the surety in the new bond, by its express terms, or by necessary implication, steps into the shoes of the surety on the old bond and assumes all his liabilities.¹

§ 735. When surety is not released by the obligee's omission to avail himself of a statutory remedy against the principal obligor. — In New York, it is the duty of a town collector of taxes to pay over to the proper officers at a stated time all the money he has collected, and the law is that if he fail to do so within the limited time, the condition of his bond is broken, and his sureties become responsible. And in addition to ordinary modes of procedure, a summary remedy against collectors is provided. The county treasurer may issue to the sheriff, a warrant directed against the property of the collector. This summary remedy, however, is merely cumulative to the ordinary process of law in such cases. The issuance and return of the warrant constitute no condition precedent to the inauguration of an action on the bond. And a total failure of the proper officer to issue such a warrant within the time limited, or at all, operates in no degree to discharge the sureties of the defaulting officer. The provision for the warrant is only for the public benefit and not for the benefit of the sureties, and is directory to the officer as to the time when it shall be issued.²

§ 736. For what acts of malfeasance of principal a surety is bound. — For what he is not bound. — The sureties of a sheriff on his official bond are not liable for acts of malfeasance by their principal, unless such acts include

¹ Mutual, etc., Co. v. Wilcox, 8 Biss. C. C. 197, 203; s. c., 4 Myers' Fed. Dec., § 637.

² Looney v. Briggs, 30 Barb. 605.

misfeasance also, as if a sheriff should wantonly destroy property which he has levied on. In such case, besides the malfeasance of malicious or wanton destruction of the property, there would be also the misfeasance or omission of duty in not keeping the property securely. If the officer does not omit any part of his duty, his fraudulent acts or misrepresentations which work an injury to a party, do not constitute a breach of his bond, nor render his sureties liable.¹

¹ *Governor v. Hancock*, 2 Ala. 728.

CHAPTER XXI.

WHAT WILL DISCHARGE SURETIES ON OFFICIAL BONDS.

PART I.

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- 754. Same subject continued — A distinction.
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769. Discharge of surety is not effected by mere delay.

770. Same subject continued.

771. Same subject continued.

772 Surety—When discharged by giving time to principal—United States bound by the action of its officers.

§ 745. Release of sureties generally.—It has been repeatedly said in the course of this work that by far the greater part of all the litigation which has grown out of official bonds and other bonds upon condition, chiefly involves the liability of the surety. The principal rarely has a valid defense; unless the bond is so grossly defective as to be absolutely void, he cannot controvert his liability upon it, and if he escapes at all it is by reason of extraneous matters in avoidance. The obligation of the surety stands upon a different footing. He contracts without any expectation of suffering loss and rarely makes any special provision to avert or alleviate it. When, therefore, the danger becomes imminent, it is a very unpleasant surprise, and he becomes diligent and zealous in his efforts to escape the consequences of his obligation. He taxes the ingenuity of the profession, and the consequence is that a great variety of questions, direct and collateral, have, from time to time, been raised for the purpose of favoring the escape of the unfortunate and too confiding sureties.

Many of these defenses have been considered in the course of this work, but it is believed that it will be well to devote this final chapter to the special consideration of the numerous grounds upon which the discharge of sureties has been, successfully or otherwise, contended for, in the various courts of this country and of England.

§ 746. Release of surety by concealments or other fraud by obligee.—Among the numerous questions which have been raised in behalf of sureties is this: whether the by-laws of a corporation regulating the duties of the principal, impose upon the corporation any obligation to protect the sureties

by timely notification of actual or impending dereliction of duty, or breaches of the bond, on the part of the principal. In England it has been held that in the case of a continuing guaranty for the honesty of a servant, if the master discovers acts of dishonesty in the servant, and afterwards continues him in his service, without notice to his sureties, the latter are discharged.¹ These rulings would seem to be equally in accord with sound principles of law and a due sense of moral obligation, but in more than one of the American states, the law has been interpreted in a precisely opposite sense. In a Massachusetts case, the by-laws of a corporation required of an agent, who had given a bond, monthly settlements and payment of balances; the agent failed to settle or pay for month after month, and the sureties on his bond were not notified until after his death, when the aggregate of his deficits exceeded the penalty of his bond. Under these circumstances the court held that the by-law of the corporation did not amount to a contract between the company and the sureties, that the former was under no obligation to cause the by-law to be observed for the benefit of the latter, that the by-law itself was merely directory, that the creditor owes no duty of active diligence to take care of the interests of the surety, that it is for the surety, not the creditor to see that the principal discharges his duty, and that mere inaction of the creditor will not discharge the surety unless it amounts to *fraud or concealment*.²

§ 747. Same subject continued. — In one of the cases cited, this much at least is conceded, that the defense in

¹ Phillips v. Foxall, L. R. 7 Q. B. 666; Enright v. Falvey, 4 L. R. Ir. 397; Sanderson v. Aston, L. R. 8 Ex. 78.

² Watertown, etc., Co. v. Simmons, 131 Mass. 85; Amherst Bank v. Root, 2 Metc. 522; Locke v. United States, 3 Mason, 446; Wright v. Simpson, 6 Ves. 714; Adams Bank v. Anthony, 18 Pick. 288; Taft v. Gifford, 13 Metc. 187; Tapley v. Martin, 116 Mass. 275; Atlantic, etc., Co. v. Barnes, 64 N. Y. 385; McKecknie v. Ward, 58 N. Y. 541.

question could *perhaps* be interposed by the surety, if it were reasonably clear that the delinquency was caused by dishonest conduct or a gross violation of the obligations imposed by the bond.¹ It is a little hard to conceive more manifestly dishonest conduct or a grosser violation of the obligations imposed by the bond than appears in the case first cited.² A series of monthly defalcations succeeding each other until the aggregate exceeded the penalty of the bond, and each necessarily and immediately known to the officers of the obligee of the bond, would certainly seem to indicate a reasonably clear delinquency.

§ 748. Same subject continued. — In an Iowa case there had been antecedent deficits known to the obligee but not known to the surety. The court held that the creditor was not bound to inform the surety that the principal had been in arrears under his former agency, unless the surety asked for information on the subject, and that the surety was bound if the obligee had done nothing to prevent the surety from ascertaining the antecedent delinquency of his principal.³ A like ruling was made in Wisconsin in a case still stronger in favor of the surety, the principal being in the employment of the obligee and a defaulter at the time the bond was executed.⁴ In Illinois the same ruling was made in a similar case; the defendant became security for the treasurer of a society, when its officers and members knew of his misappropriation of funds entrusted to him during the preceding year, and with such knowledge re-elected him, and failed to communicate the information to his sureties. It was held that as the society did nothing to put the defendant off his guard, no fraud could be imputed to it which would avoid the surety's liability on the bond.⁵

¹ *Atlantic, etc., Co. v. Barnes*, 64 N. Y. 385.

² *Watertown, etc., Co. v. Simmons*, *supra*.

³ *Home, etc., Co. v. Holway*, 55 Iowa, 571.

⁴ *Aetna, etc., Co., v. Mabbett*, 18 Wis. 667.

⁵ *Roper v. Trustees, etc.*, 91 Ill. 518. See, also, *Ham v. Grove*, 34 Ind. 18; *Atlas Bank v. Brownell*, 9 R. I. 168.

In the Iowa case already cited,¹ a distinction is taken between cases in which the principal obligor is criminal or merely dishonest. The court seems to concede that if by his delinquency he had incurred a criminal liability the case would be different.

§ 749. Same subject continued — American following of English rulings. — The American following of the English cases heretofore cited,² is quite scanty, but the doctrine held by the courts which have taken that view is unequivocal. In a New Jersey case the court says: “It is the duty of a person taking a guaranty for the good conduct of an employe, to disclose the past malpractices of such employe in the course of the business to which the guaranty relates, and that if such duty is not performed, the instrument so taken is *ipso facto* invalid. The continuance of an agent in an employment is an act so expressive of trust and confidence that it is tantamount to an express declaration to that effect, and hence it must, under usual circumstances, have all the effect of a meditated fraud, if the person so retaining the agent can be permitted to disown the implications inevitably arising from his own conduct.”³ The supreme court of Maine holds similar views. It says: “To receive a surety known to be acting upon the belief that there are no unusual circumstances by which his risk will be materially increased, well knowing that there are such circumstances, and having a suitable opportunity to make them known, and withholding them, must be regarded as a legal fraud, by which the surety will be relieved from his contract.”⁴ In a like case the supreme court of Ohio says: “The bad faith in withholding from the guarantor such information,” (i.e., concerning previous defalcation com-

Home, etc., Co. v. Holway, *supra*.

² Phillips v. Foxall, etc., *supra*.

³ State v. Lovey, 39 N. J. L. 135.

⁴ Franklin Bank v. Cooper, 36 Me. 179, 197.

mitted by the employe) "so material to the risk assumed, is manifested not only from the fact that the dishonest character of the agent was peculiarly within the knowledge of the principal, but the holding him out as a person entitled to confidence by continuing him in the service, was equivalent to a declaration that the principal had no knowledge of the dishonesty of the agent."¹

§ 750. Same subject continued — Mr. Justice Story's view. — On this subject, Mr. Justice Story takes very broad ground. He says: "Thus if a party taking a guaranty from a surety conceals from him facts which go to increase his risk, and suffers him to enter into the contract under false impressions as to the real state of facts, such concealment will amount to a fraud, because the party is bound to make the disclosure, and the omission to make it under such circumstances is equivalent to an affirmation that the facts do not exist."² And quoting and following this authority, the court in a Kentucky case says: "There is no principle better settled than that persons proposing to become sureties to a corporation for the good conduct and fidelity of an officer to whose custody its moneys, notes, bills, and other valuables are entrusted, have the right to be treated with perfect good faith. If the directors are aware of secret facts materially affecting and increasing the obligation of the sureties, the latter are entitled to have these facts disclosed to them, a proper opportunity being presented." And in this case the court holds that the usual semi-annual statement of the condition of a national bank, published in the newspapers, prepared by the cashier, and attested by the directors, or a committee of them, together with the re-election of the cashier, was sufficient to charge the bank with having made the representation to the world

¹ *Dinsmore v. Tidball*, 34 Ohio St. 411, 418.

² 1 Story Eq. Juris, § 215.

(including the proposed sureties) that the statement was correct, and the cashier was all right.¹

§ 751. Same subject continued — Georgia ruling. — The view of a Georgia court on this subject is well worthy of consideration. Speaking of the failure of an agent to account for and pay over daily, money received by him, the court says: “If the corporation, or its supervising officers, have reason to believe that it results from dishonest practices or intentions, such as the conversion of the money, or a purpose to convert it, no further funds can rightfully be committed to his custody. If on the other hand the circumstances do not point to moral turpitude, but to lax habits of business, mere negligence, procrastination, a want of diligence or punctuality, rather than a want of honesty, the corporation may continue to trust him, treating his successive failures in promptness as breaches of contract only, and relying upon the bond for protection should ultimate loss occur. When a thief is detected, confidence ought to be withdrawn, at least until those who are likely to be injured by his larcenies have been warned. To persist in supplying him with money after he has made up his mind to steal and you know it, is contrary to sound morality, unless you mean to bear the loss yourself. Considerations not of contract only, but of crime are involved. A question of honesty is raised, and honesty and equity are one. * * * On the other hand, indolence, carelessness, inattention to business, want of promptness, a disposition to put off and procrastinate, are failings that * * * may consist with moral integrity. Of such infirmities and their consequences, a surety may be supposed to have considered once for all, when he entered into his contract. They are, so to speak, insurable, though hazardous, and the underwriter may be left to take care of

¹ *Groves v. Lebanon Nat. Bank*, 10 Bush (Ky.), 23.

himself.’’ The conclusion to which the court arrives from this course of reasoning is thus stated: ‘‘The surety is discharged if the corporation discovered dishonesty in the agent, and afterwards entrusted him with more funds without giving some notice or warning to the surety.’’¹

§ 752. Same subject continued — New York ruling. — The view of the New York court of appeals on this subject, expressed in a recent case, is that if the directors of a bank had knowledge that the cashier had been dishonest or unfaithful in his previous office of teller, they were bound to apprise his sureties (as cashier) of that fact, otherwise they could not hold them. But mere irregularities or omissions of duty, which did not affect moral character or official integrity and fidelity, although known to the directors and not disclosed by them, will not enable the sureties to defend upon the ground that they have been deceived. ‘‘Sureties,’’ the court says, ‘‘are supposed to know the character of their principal, and to be willing to be bound for his fidelity. They must inquire and inform themselves of all the facts they desire to know, and if they omit to seek for or obtain the requisite information, they cannot easily avoid the bond upon inferential or unsatisfactory proof that they were drawn into signing it by bad faith on the part of the obligee. Before a bond in such a case can be avoided, the fraud and bad faith should be brought home to the obligee by quite clear and decisive evidence, otherwise bonds of this character will furnish a very precarious security to the parties who take them.’’²

§ 753. Same subject continued — Rhode Island ruling. — In a Rhode Island case the court says: ‘‘We think it

¹ Charlotte, etc., Co. v. Gow, 59 Ga. 685.

² Bostwick v. Van Voorhis, 91 N. Y. 353, 361; Tapley v. Martin, 116 Mass. 275; Atlantic, etc., Co. v. Barnes, 64 N. Y. 385; 21 Am. Rep. 621; Board, etc., v. Otis, 62 N. Y. 88; Atlas Bank v. Brownell, 9 R. I. 168; 11 Am. Rep. 231.

would be going too far to say that the creditor is in all cases, and without being inquired of, bound to communicate everything that it is important for the surety to know, and that would increase his risk. Under such a rule no one would ever know when he could rely on a bond, and it would lead to a great deal of litigation. We think the safe rule is, that to avoid the bond, there must be on the part of the creditor, a fraudulent concealment or withholding of something material for the surety to know.”¹ Judge Story’s view of this matter is that “to make void a contract, the concealment must amount to the suppression of facts which one party is bound in conscience and duty to disclose.”² A little later he says that one party is only obliged to disclose that which the other “has a right not *in foro conscientiae*, but *juris et de jure* to know.”³ In a subsequent section of the same work the author in effect, excepts the contract of suretyship from the rule above stated. He says: “If a party taking a guaranty from a surety, conceals from him facts which go to increase his risk, and suffers him to enter into the contract under false impressions as to the real state of the facts, such a concealment will amount to a fraud, because the party is bound to make the disclosure.”⁴

§ 754. Same subject continued—A distinction.—A distinction is sometimes taken between matters which do and which do not directly relate to the business intended to

¹ *Atlas Bank v. Brownell*, 9 R. I. 168.

² *Story Eq. Jurisp.*, § 204

³ *Story Eq. Jurisp.* § 207.

⁴ *Story Eq. Jurisp.*, § 215; *Pidcock v. Bishop*, 3 Barn. & Cr. 605; *Owen v. Homan*, 3 Eng. Law & Eq. 121; *s. c.*, 4 H. of Lords Cases 997; *Squire v. Whitton*, 1 H. of Lords Cases, 333; *Railton v. Mathews*, 10 Clark & Fin. 935; *Hamilton v. Watson*, 12 Clark & Fin. 109, 118; *North British Ins. Co. v. Lloyd*, 28 Eng. Law & Eq. 456; *s. c.*, 10 Exch. 523; *Evans v. Kneeland*, 9 Ala. 42; *Leith Banking Co. v. Bell*, 8 Shaw & Dun. 721; *Carew’s Case*, 7 De G. M. & Gr. 48.

be conducted under the required guaranty. If the information withheld relates to the proposed business directly, it may be the duty of the obligee of the bond to communicate that information, whereas, under the rulings of some courts, the obligor is not entitled to the information, if its connection with the business is collateral and indirect. Thus, in the Rhode Island case already cited, a board of directors required an increase of their cashier's bond because they ascertained that he was gambling, a fact which they did not disclose, to the sureties. This, the court held, they were not bound to disclose, because it did not relate to the duties of a cashier, and because it did not follow that he would fail as cashier because he gambled. This reasoning, it is believed, is futile, for if the gambling was a matter which induced the bank to require of the cashier an increase of his bond, it manifestly increased the peril of the surety, and might, if known to him, have induced him to withdraw his guaranty altogether. A better reason is that the relation between the obligor and the obligee of a bond or guaranteee is not a confidential relation. As to the obligee, the surety is a volunteer, he comes forward and says in effect: "A. B. is the right man for the place, he is honest and capable, and I will guarantee to the amount of the penalty of the bond you require, that he will make you a good officer." The only question between the obligee and the surety is the sufficiency of the latter. The confidential relation is between the principal and surety, the former should in equity and good conscience disclose to the latter the extent and character of the liability, and the surety has no right in any point of view to expect voluntary and unsought confidences from the obligee of his bond.

And this principle is recognized in a recent Iowa case in which the court says: —

"A surety is not discharged from liabilities from the mere fact that the principal is continued in the master's

employment after he has failed to make payment promptly of which fact the surety has not been advised.”¹

§ 755. Surety is released by the privity of the obligee to the breach of the bond, or by the interference of the beneficiary which causes a breach of the bond. — Not only is a surety, released when the obligee or beneficiary has been guilty of fraud or concealment, such as tended to the loss or injury of the surety, but the same result occurs when the obligee, a corporation, by willfully neglecting to examine the principal’s accounts * * * “and otherwise permitted, encouraged, induced, and were privy to the alleged breach.” The court says of the plea in question: “It alleges in substance that the obligees in the bond intentionally brought about the breach now complained of. They must, therefore, be estopped from complaint. The maxims, ‘*volenti non fit injuria*,’ ‘*nullus commodum capere potest de injuria sua propria*,’ are both in the way of a plaintiff so situated.” It may be remarked, however, that the court does not decide, the case not requiring it, whether mere neglect of legal duty by the city, or active misconduct on the part of other city officers would impair the obligations of the sureties.²

And upon the same principle sureties are released when the regular and appropriate duty of a ministerial officer is varied by reason of the interference of the plaintiff in the action. When the plaintiff directs the officer to proceed otherwise than in due course of law, as for example, to sell not for cash but upon credit, property taken in execution, he makes the sheriff his agent and the sureties are no longer liable for the acts of the officer. They are authorized by law to stand upon the very terms of their contract, under it they would be liable for the act of the sheriff, in making

¹ *Phoenix Ins. Co. v. Findley*, 59 Iowa, 591; *Home Ins. Co. v. Holway*, 55 Iowa, 571.

² *Mayor, etc., Newark v. Dickerson*, 45 N. J. L. 38; *s. c.*, 16 Reporter, 240.

a sale of goods seized for cash, that being the rule prescribed by law, but not for a sale upon credit at the instance of the plaintiff, and even with the sanction of the court,¹ because such is not his duty under the law.

§ 756. Discharge of surety — Effected by alteration of contract without his consent — Rule of evidence. — It is a well established principle that an alteration of an instrument in a material point by a party claiming under it renders it void. And if an instrument which is or would be obligatory on a surety is altered without his consent he will be discharged from his liability; and in pursuance of these principles it has been held that the erasure of the name of one surety upon the bond of a United States marshal will release his co-surety, although such erasure be made before the approval and acceptance of the bond by the district judge. It is true that sureties who, after the erasure, and with knowledge of it, appeared before the judge and acknowledged the bond as a preliminary to his approval of it, are estopped by their action from interposing any objection, but, if any one of the sureties omitted to appear and acknowledge, the instrument is void as to him by reason of the alteration or erasure. And the general rule of evidence on this subject is, that where any suspicion is raised as to the genuineness of an altered instrument, whether it be apparent upon inspection, or be made so by extraneous evidence, the party producing the instrument and claiming under it, is bound to remove the suspicion by accounting for the alteration. As to the party who makes the alteration, the old rule, which is still strictly adhered to in England, was and is that every material alteration of a written instrument, whether made by a party or stranger, is fatal to its validity if made after execution, and while the instru-

¹ *Rollins v. State*, 13 Mo. 487; *Kimball v. Perry*, 15 Vt. 414. See, *post*, § 788.

ment is in the possession or under the control of the party seeking to enforce it, and without the privity of the party to be affected by the alteration.¹ Judge Story, however, condemns so much of the rule as holds that a material alteration of a deed by a stranger, without the privity of the obligor or obligee, avoids the deed, and holds that where the alteration, cancellation, or erasure was procured by fraud or imposition of the obligee the deed will not be avoided.² And it is perfectly clear that “there are many cases where equity will set up debts extinguished at law, against a surety as well as against a principal; as where a bond is burnt or cancelled by accident or mistake, and much stronger, if the principal procure the bond to be delivered up by fraud, in such a case the court would certainly set it up, because he shall not avail himself of the fraud of any of the debtors.”³

§ 757. Same subject continued. — It is manifestly the rule, therefore, as well of law as of equity that when an erasure or alteration of an instrument has been made, it is incumbent upon the party claiming under it as against a surety, to account for such erasure or alteration by showing that the alteration was made with the privity and consent of the surety, or that it was made by accident or mistake, or by, or in consequence of the fraud of the principal in the obligation.⁴ If he can show none of these things, and if the alteration is material, increasing in any degree the liability of the surety,

¹ Pigott's Case, 11 Coke, 27; Master *v.* Miller, 4 Term, 330; Davidson *v.* Cooper, 11 Mees. & W. 778; s. c., 13 Mees. & W. 343.

² United States *v.* Spalding, 2 Mason C. C. 476, 484; Waugh *v.* Russell, 5 Taunt. 707; Totty *v.* Nesbitt, and Mattison *v.* Atkinson, 3 Term, 153 (note c); Henfree *v.* Bromley, 6 East, 309; United States *v.* Cutts, 1 Gallison C. C. 69; Perrott *v.* Perrott, 14 East, 423.

³ Lord Hardwicke in Skip *v.* Huey, 3 Atk. 91, 93.

⁴ Skip *v.* Huey, 3 Atk. 91, 93.

or diminishing his remedies, proximate or remote, the instrument is a nullity as to such surety.¹

It may, therefore, be considered settled that the rule as to the effect of interlineations and alterations made in a bond after its execution, and without the consent of the sureties, is this, in which Mr. Justice Clifford follows Lord Brougham, who says: "Any variation in the agreement to which the surety has subscribed, which is made without the surety's knowledge and consent, and which may prejudice him, or which may amount to a substitution of a new agreement for the one to which he subscribed, will discharge the surety, upon the principle of the maxim *non hæc in foedera veni.*"² It is equally true that alterations in a bond made by the obligee or his agent after the execution of the instrument, will not vitiate the bond if they are immaterial, do not change the nature and effect of the contract, nor prejudice the rights or interests of the obligors.³

§ 758. What alterations of a contract will release the surety — Illustrations — Extension of time of liability etc. — A surety will be released by an alteration of the time when, or the persons by whom the contract is to be performed, or the subject-matter to be affected thereby. Thus a contract extending the liability of a surety beyond the time contemplated by him, without his knowl-

¹ *Smith v. United States*, 2 Wall. (69 U. S.) 219, 237; *s. c.*, 4 Myers' Fed. Dec., §§ 723, 724, 725, 726, 727. See, on the liability of sureties generally, *Birkhead v. Brown*, 5 Hill, 635; *McClusky v. Cromwell*, 1 Kern, 598; *Leggett v. Humphreys*, 21 How. (62 U. S.) 76; *United States v. Boyd*, 15 Pet. (40 U. S.) 208; *Kellogg v. Stockton*, 29 Penn. St. 460; *McMicken v. Webbs*, 6 How. (47 U. S.) 296; *Gasso v. Stinson*, 2 Sumn. C. C. 452; *Agawam Bank v. Sears*, 4 Gray, 95; *Howe v. Peabody*, 2 Gray, 556; *Burchfield v. Moore*, 25 Eng. Law & Eq. 123; *Martin v. Thomas*, 24 How. (65 U. S.) 315; *Bonar v. McDonald*, 1 Eng. L. & Eq. 1.

² *Smith v. United States*, 2 Wall. (69 U. S.) 219, 237; *s. c.*, 4 Myers' Fed. Dec., §§ 727, 728; *Bonar v. McDonald*, *supra*.

³ *Crawford v. Dexter*, 5 Sawy. C. C. 201, 205; *s. c.*, 4 Myers' Fed. Dec., § 738.

edge or consent will release him, as the renewal of a note in bank for which the surety became bound only for the payment of the note at maturity.¹ And so an alteration of the mode in which the contract is to be performed, as the substitution of a different material from that stipulated for, in the construction of a building. And in such a case it is immaterial whether the change in the terms of the contract was for the advantage of the surety or otherwise.² And if, after the execution of a bond by principal and sureties, the former, with the consent of the marshal, erases his name from the instrument, the sureties are released.³ And the sureties on a warehouse bond were held to be released, because when the goods, for the duties on which they were responsible, had become "abandoned," the secretary of the treasury had postponed their sale beyond the period prescribed by the law in force at the date of the bond.⁴

§ 759. **Same subject continued.** — It is true that if an insurance agent makes a contract with his company by which he devotes his commissions to the payment of his debts, he does not thereby release his sureties from liability on his bond, but there are other contracts between the obligee and principal obligor which will have that effect. These latter contracts, however, it may be remarked, are alterations or modifications of the original contract upon which the bond was founded. Thus a change in the compensation of an agent made after the execution of the bond, presumably without the consent of the sureties, from a salary to a commission, discharges the sureties. This ruling seems to be based on the ground that the contract, as

¹ *Bank of Mt. Pleasant v. Sprigg*, 1 McLean C. C. 178.

² *United States v. Tillotson*, 1 Paine C. C. 306.

³ *Martin v. Thomas*, 24 How. (65 U. S.) 315; *Miller v. Stuart*, 9 Wheat. (22 U. S.) 702; *Hunt. Adams*, 6 Mass. 521.

⁴ *United States v. De Visser*, 10 Fed. Rep. 642.

altered, threw upon the agent expenses and risks and temptations to which he would not be exposed if he did his work for a salary, when he was exposed to no danger of loss, and consequently was under no temptation to make up his personal deficit out of his employers' money.¹ The change, however, it would seem must be from a salary to commissions, minor modifications of the contract will not suffice to discharge the sureties. Thus, where an agent received a certain per cent on his receipts, and the company guaranteed that they should amount to a specified sum monthly, and by a new arrangement he was to receive larger commissions, but give up the guaranty, the change was not regarded as of such a character as would discharge the sureties. It imposed no new duties, obligations, or expenses on the agent.² It is otherwise, however, when the change in the relations of the parties is radical, as the change of the principal obligor from the *status* of an agent to that of a conditional purchaser. This, if made by and between the obligee and the principal, without the consent of the surety, releases the latter from liability on the bond. Such a change is a total departure from the true nature of the original contract, and may probably involve increased responsibility and risk.³

§ 760. Imperfections of bond that will release a surety — Erasure — The obligation of a surety on an official bond is of course controlled by the terms of the bond itself. This, however, is upon the supposition that the execution, and delivery, and approval or acceptance of the bond are all regular and in due and legal form. The validity of the bond will be abrogated if after its execution one of the signatures is erased. Thus where an official bond was signed by a

¹ Victor, etc., Co. v. Langham, 9 Biss. C. C. 183, 187; s. c., 4 Myers' Fed. Dec., § 677; citing and following Northwestern, etc., Co. v. Whinsay, 10 Exch. R. 75.

Amicable, etc., Co. v. Sedgwick, 110 Mass. 163.

³ Gass v. Stinson, 2 Sumn. C. C. 453, 469; s. c., Myers' Fed. Dec., § 718.

number of persons after the signature which was subsequently erased, it was held that those persons were not liable on the bond for the obvious reason, that they executed it upon the faith of that signature, and upon the condition that the person bearing that name would be their co-security, and that in entrusting the principal with the delivery of the instrument, they gave him no authority to alter it or deliver it in any other condition than as it then stood. And it was further held that the release of those sureties who signed the bond after the person whose signature was erased, operated to release those sureties also who signed the instrument above the erased signature. And this, because in signing the instrument and committing it to the charge of the principal to obtain other signatures, they must have understood that the proper and agreed number of sureties must be obtained, and must be of such persons as could be held liable.¹

§ 761. Forgery of a surety's name—When not a defense.—It is a well settled principle that when one of two innocent persons must lose by the fraud or deceit of another, the loss must fall upon him who trusted that person and put it into his power to work the mischief complained of. When a principal has forged the name of a person as his surety on his official bond, and other sureties have actually signed it, the instrument was held good against them. The principal was their agent, trusted by them with the custody of the instrument for the purpose of procuring further signatures, and of submitting the bond to the proper tribunal for acceptance and approval.²

¹ *State v. Craig*, 58 Iowa, 238; *Smith v. United States*, 2 Wall. (69 U. S.) 219; *McCramer v. Thompson*, 21 Iowa, 244; *Dickerman v. Miner*, 43 Iowa, 508.

² *Stern v. The People*, 102 Ill. 540. See also, *Sealey v. People*, 27 Ill. 178; *Stoner v. Millikin*, 85 Ill. 218; *City of Chicago v. Gage*, 95 Ill. 593; overruling *People v. Organ*, 27 Ill. 29; *Smith v. Peoria*, 59 Ill. 412; *Comstock v. Gage*, 91 Ill. 328; *State & Baker*, 64 Mo. 167.

§ 762. Sureties, release of — Laches of United States government officers will not release. — It is undoubtedly true that the laches of a creditor will in a proper case operate to release a surety, but it is equally well established that when that creditor is the United States the plea of laches is wholly unavailable. The government is never bound by the laches of its agents, and therefore that plea is bad although the defendant be a surety.¹

And a surety is not released from his liability on a postmaster's bond by the neglect of the postmaster-general to inform such surety of his principal's default, no inquiry having been made.² Nor will the failure to remove a defaulting postmaster operate a release of his sureties;³ nor will a direction to a postmaster not to remit funds but to hold them to answer the drafts of the postmaster-general;⁴ nor will an illegal order of the postmaster-general dispensing with the quarterly returns required by law; such order being void cannot be construed as a contract discharging the sureties.⁵

§ 763. Discharge of sureties — Not effected by disobedience of superior officer to a directory requisition of a statute — Effect of fraud. — Where by a statute it is made the duty of a superior officer to institute suits on the official bonds of delinquent subordinate officers, his neglect to do so although it may expose him to penalties or other unpleasant consequences, cannot operate to release the sureties upon such official bonds. The well established rule that the government is not liable for the laches of its agents

Raymond *v.* United States, 14 Blatchfd. C. C. 51; United States *v.* Kirkpatrick, 9 Wheat. (22 U. S.) 720, 735; United States *v.* Vanzandt, 11 Wheat. (24 U. S.) 184; United States *v.* Nicholl, 12 Wheat. (25 U. S.) 505; Jones *v.* United States, 18 Wall. (85 U. S.) 662.

² Postmaster-General *v.* Reeder, 4 Wash. C. C. 678.

³ Postmaster-General *v.* Munger, 2 Paine C. C. 189.

⁴ Postmaster-General *v.* Reeder, 4 Wash. C. C. 678.

⁵ Locke *v.* Postmaster-General, 3 Mason C. C. 446.

forbids such a result. Such statutes are directory to the superior officers, and form no part of the contract between the government and the surety.¹ But if it appear, either by evidence or the admission of the plaintiff by demurrer, that the officer's delay in bringing suit, or neglect to sue, was the result of fraud the plaintiff cannot recover.²

§ 764. Duty of sureties — Negligence — What will not release a surety.—A surety is a favored debtor. His rights are especially and zealously guarded both at law and in equity, and the slightest fraud by the creditor touching the contract annuls it. His contract, exactly as he makes it, is the measure of his liability, and cannot be varied without his consent. With these privileges, however, are associated certain duties. He must take care of himself and obtain all the information essential to his interest that lies within his reach. It is no part of the duty of the creditor to furnish him such information. If he neglects his interests and a loss occurs he must bear it, unless he can show that it was the consequence of the creditor's fraud. What would constitute such a fraud is too broad a subject to be considered in this connection, but it is not such a fraud, for the obligee, an insurance company, to stipulate with the principal obligor (an insurance agent) that he should devote his commissions earned under the contract to the liquidation of an antecedent debt due to the company. In such a case it was decided to be perfectly fair for the insurance company to make such a bargain with their agent and thus collect as much of their debt as they could, and that his sureties were entitled to no infor-

¹ Postmaster-General *v.* Reeder, 4 Wash. C. C. 678; United States *v.* Kirkpatrick, 9 Wheat. (22 U. S.) 720; United States *v.* Vanzandt, 11 Wheat. (24 U. S.) 184; Gausen *v.* United States, 7 Otto (97 U. S.) 584; Raymond *v.* United States, 14 Blatchfd. C. C. 51.

² Postmaster-General *v.* Ustick 4 Wash. C. C. 347.

mation on the subject from the company, unless they asked for it.¹

§ 765. When sureties are not discharged by laches — What is not a sufficient charge of fraud. — When the officers of a private business corporation neglect to perform the duty required by the charter and by-laws of the institution, of making stated examinations of the treasurer's accounts, his sureties are not released by that omission without more. It must be shown either that the examination was made by the contract a condition of the liability of the sureties, or else that the laches and neglect of the officers of the corporation were the result of fraud, for mere laches without fraud will not relieve sureties.² And a general charge of "great laches and gross irregularities, accompanied with fraud * * * in this that they failed to have the monthly, quarterly, and annual accountings with their treasurer * * * and that they failed to investigate his accounts and financial standing, etc.," is not a charge of fraud sufficient to exonerate securities. The facts as stated show *laches* and negligence, and it is merely asserted that they were accompanied with fraud. To make a plea of this character available, it is necessary to set up in issuable form the acts of fraud committed, and the acts omitted through fraud.³

§ 766. Surety — Not released by negligence of the directors of the obligee bank. — To effect a release of sureties there must be a fraud practiced by the directors, or at the least a knowledge of the default of the officer at

¹ *Magee v. Manhattan, etc., Co.*, 2 Otto (92 U. S.), 93, 101; *s. c.*, 4 Myers' Fed. Dec., §§ 674, 676.

² *Mutual, etc., Association v. Price*, 16 Fla. 204, 212; *s. c.*, 19 Fla. 127; *United States v. Kirkpatrick*, 9 Wheat. (22 U. S.) 721; *Trent, etc., Co. v. Harley*, 10 East, 84; *Pittsburg, etc., Co. v. Schaeffer*, 59 Penn. St. 350.

³ *Mutual, etc., Association v. Price*, 19 Fla. 127.

the time the bond was executed. The duty of directors of a bank or similar corporation, to supervise the conduct of their cashiers and other officers, to scrutinize their accounts or cause them to be examined by experts, is a duty which they owe to the corporation of which they are directors, or to the stockholders of the institution, not to the sureties on the official bonds of its employes. To them the directors owe no duty, and they can incur no liability to the sureties, either in their personal or representative capacity, except by actual fraud.¹

§ 767. Release of surety by extension of time or credit — Distinction taken. — It is familiar law that an extension of credit by the obligee of a bond to the principal obligor, without the consent of his sureties, will release them. There are, however, some exceptions to be made and some distinctions to be taken. If the extension of credit be procured by the fraud of the obligor, the sureties will not be released. Thus, where the principal in a bond, which was conditioned for the collection and payment to the obligee of money, rendered a false account and gave a deed of trust upon property to secure the payment of the amount appearing by that account to be due, and by that means secured the extension, the sureties were released as to all the indebtedness which appeared in that account, but were not discharged as to the undisclosed remainder of the debt. The rendition of a false and fraudulent account is a breach of the condition of a bond, (its obligation being to account fairly when required to do so), it is manifest that sureties cannot be released from their liability by the very fact which fixes it and makes it absolute. And it may be added that a deed of trust accepted in satisfaction of a bond will

¹ *Bennett v. S. A., etc., Association*, 57 Tex. 72, 74; *Tapley v. Martin*, 116 Mass. 275; *Wayne v. Commercial, etc., Bank*, 52 Penn. St. 343. See, however, *Graves v. Lebanon Nat. Bk.*, 10 Bush, 23.

not, if the acceptance be procured by fraud, operate as an accord and satisfaction.¹

§ 768. Same subject continued. — If, by an agreement between the creditor and the principal obligor the surety's remedy be impaired, he is thereby discharged. And if, after the debt is due, the creditor precludes himself even for a single moment from proceeding against the principal, the same result follows.² If, however, the agreement to give time be upon a condition which is never performed, or if in the agreement all the rights of the surety be reserved, or if the agreement be made with the assent of the surety, he is not discharged.³

§ 769. Discharge of surety is not effected by mere delay. — The failure of public officers of the United States to assert the right of the government against a defaulting principal in an official bond, will not operate to discharge his sureties. Their laches, it has been repeatedly said, cannot affect the government. And even if the delay be long continued, so that the sureties lose the benefit of remedies which would have been available if the government had acted promptly, it is, so far as they are concerned, *damnum absque injuria*. A lapse of five years after the cause of action accrued will not create any presumption of payment, or in any degree operate in favor of the sureties.⁴

¹ Hopkirk *v.* McConnico, 1 Brock. (Marshall's Decisions) C. C. 220, 227; *s. c.*, 4 Myers' Fed. Dec., §§ 682, 683, 684; Nesbit *v.* Smith 2 Bro. Ch. Cases, 579; Rees *v.* Barrington, 2 Ves. jr 540.

² Croughton *v.* Duval, 3 Call, 69; Hill *v.* Bull, Gilmer (Va.), 149; Bennett *v.* Maule, Gilmer (Va.), 328.

³ Norris *v.* Crumney 2 Rand. 323; Hunter *v.* Jett, 4 Rand. 404. See, also, on this subject generally, United States *v.* Nichol, 12 Wheat. (25 U. S.) 505; McLemore *v.* Powell, 12 Wheat. (25 U. S.) 554; Miller *v.* Stuart, 9 Wheat. 22 U. S. 680; United States *v.* Tillotson, 1 Paine C. C. 305.

⁴ Dox *v.* Postmaster-General, 1 Pet. (26 U. S.) 318, 327; *s. c.*, 4 Myers' Fed. Dec., §§ 770, 771; United States *v.* Kirkpatrick, 9 Wheat. (22 U. S.) 720; United States *v.* Vanzandt, 11 Wheat. (24 U. S.) 184, 191. See, also, Hunt *v.* United States, 1 Gall. C. C. 31, 37.

§ 770. Same subject continued. — The delay, which will operate to discharge sureties must be accompanied by a suspension of the *right* to proceed at law upon the obligation. Taking a collateral security, such as a mortgage, will not discharge the surety, unless the obligee parts with his right to his remedy upon the bond. And it is not material that the obligee suspends his right of action for only a very short time. Suspending that right at all releases the surety, and in that respect official bonds and negotiable paper stand upon the same footing. Giving time to the principal releases the surety in one class of obligations, and the indorser in the other, and in neither case does taking a collateral security, without giving time, have that effect.¹

§ 771. Same subject continued. — While the rule is well established that giving time by the creditor to the principal debtor without the consent of surety releases the latter, it by no means follows as a matter of course that such release is effected in every case in which time is so given. For when, at the time the bond is executed, such extension of the time of payment was in contemplation of the parties, the release of the sureties does not take place. This, however, would seem to be put upon the ground of a consent, express or implied, on their part, in consequence of their knowledge of the plans of the principals.². And if the time be given after the forfeiture of the bond, it seems that the remedy of the surety is in equity, for by the forfeiture his liability has become absolute, and he is to be regarded as a principal debtor.³

¹ United States *v.* Hodge, 6 How. (47 U. S.) 279, 284; *s. c.*, 4 Myers' Fed. Dec., § 766; James *v.* Bader, 1 Johns. Cas. 131; Kennedy *v.* Motte, 3 McCord, 13; Hurd *v.* Little, 12 Mass. 502; Ruggles *v.* Pattern, 8 Mass. 480; United States *v.* Nichols, 12 Wheat. (25 U. S.) 505.

² Nash *v.* Heilman, 9 Biss. C. C. 358, 365; *s. c.*, Myers' Fed. Dec., §§ 776, 777.

³ United States *v.* Howell, 4 Wash. C. C. 620.

§ 772. Surety—When discharged by giving time to principal — United States bound by the action of its officers. — The rule of law is that if a creditor, without the knowledge and consent of the surety, express or implied, gives time to the principal debtor by enlarging credit beyond the period mentioned in the contract, the surety is discharged as well at law as in equity; this rule applies as well to bonds with collateral conditions as to direct obligations, and it is wholly immaterial whether the arrangement is intended for the benefit of the surety or not. And if the United States, by the act of its public agent, gives time in this manner to its debtor, and thereby becomes disqualified from pursuing its legal remedy, either upon its own motion, or upon the requisition of the surety, it loses its recourse against the surety, who is discharged by the indulgence. The sovereignty of the creditor in such case does not prevent the operation of the rule.¹

¹ *United States v. Hellegas*, 8 Wash. C. C. 70.

CHAPTER XXI.

WHAT WILL DISCHARGE SURETIES ON OFFICIAL BONDS.

PART II.

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§ 773. Sureties when not released by increased liability, imposed upon principal by subsequent legislation. — How far the liability of sureties is affected by statutes changing the character of the duties and responsibilities of their principal, enacted after the execution of the bond, is a subject which has been very fully considered by the courts. The results of the adjudications on this subject have been elsewhere stated.¹ It may be remarked here that statutes which do not change the nature of the office, nor impose upon the officer duties alien in character to those which properly appertain to his position, operate in no degree to exonerate the sureties on his bond, although they may materially increase the *quantum* of their responsibility. Thus, where a statute was enacted after the execution of a postmaster's bond, by which the rates of postage were materially increased, so that much larger sums came to the hands of the postmaster than would otherwise have done, the sureties were nevertheless responsible for the amounts actually received by him. "The undertaking of the sureties is from its nature prospective, and is limited only by the terms of the bond, that the money for which they shall be called upon to account must have been received by their principal

¹ *Ante*, § 711 *et seq.*

as postages established by law.”¹ The court adds: “Had the acts of congress referred to, enlarged the powers of the postmaster, or superadded new duties, whereby he was made the receiver of other moneys than for postages, the sureties in this bond would not have been responsible therefor.”

§ 774. Same subject continued. — The sureties of a public officer will not be relieved of the liability incurred by their official bond, by reason of the imposition of new duties upon their principal either by statute or other competent authority. They are in no respect liable for the manner in which he may discharge those new duties, nor for his neglect to discharge them at all. If the duties in question are apart from the ordinary functions of his office, his appointment by his official description is merely a *designatio personæ* and not an addition to the duties of his office, and as they impose no additional duty upon him as an officer, and no new liability on his sureties, they cannot operate to discharge them from their antecedent obligations. It is otherwise, if after the bond has been executed, the nature of the office be changed by law. In that case the office is no longer the same within the meaning of the bond, and the surety is discharged.²

§ 775. Release of sureties of officer by reason of extension, by legislative act, of his time for accounting. — It has already been said that in a number of the states, sureties on the bond of a tax collector are discharged by an act of the legislature, passed after the execution of the bond, without their consent, giving further time for the collection of taxes and settlement by the officer. Among these states

¹ *Postmaster-General v. Munger*, 2 Paine C. C. 189, 199; *s. c.*, 4 Myers' Fed. Dec., § 601; see *post* § 759.

² *Gaussin v. United States*, 7 Otto (97 U. S.), 584, 594; *s. c.*, 4 Myers' Fed. Dec., §§ 740, 741.

are Illinois, Tennessee, and Missouri. In other states, the courts hold that the official bond of the tax collector is given with a full knowledge of the right of the legislature to alter the dates fixed by law, for the collection of taxes and the settlement of the collector, and subject to the exercise of that right at the pleasure of the legislature, without the assent of the sureties; and, therefore, such alteration does not operate to discharge the sureties. Among these states are Virginia, Maryland, North Carolina and by a recent decision, Mississippi.¹

§ 776. Discharge of surety — Whether liability may be terminated by notice. — In the absence of a statutory provision to that effect, a surety cannot procure his release by giving notice to the obligee of the bond, of his desire and intention to terminate his liability. He must resort to a court of equity, and whatever relief he can obtain must be awarded by that tribunal. In a Massachusetts case of an action on a deputy sheriff's bond to his principal, it was held that a plea that the sureties of the deputy had given to the sheriff notice that the deputy had become intemperate, negligent, and unfit for office, and had requested his removal, was not a sufficient plea, and that the facts stated in it, if true, could not defeat the action. The court says: "There are no authorities to establish the ground of defense set up, though there are some analogous cases in New York inclining that way, particularly the case of *Pain v. Packard*, 13 Johns. R. 174, where a surety on a promissory note having requested the owner to proceed immediately against the principal, who was then solvent and who afterwards became insolvent, was exonerated in consequence of the holder's neglecting to comply with the request. But this case is

¹ *State v. Swinney*, 60 Miss. 39, 44; *Commonwealth v. Holmes*, 25 Gratt. 771; *Smith, v. Commonwealth*, 25 Gratt. 780; *State v. Carleton*, 1 Gill. 249; *Prairie v. Worth*, 78 N. C. 169; *Smith v. Peoria*, 59 Ill. 412; *Bennett v. The Auditor*, 2 W. Va. 441.

questioned by Mr. Chancellor Kent, and two of the judges afterwards retracted their opinion, and the decision was sanctioned in *King v. Baldwin*,¹⁷ Johns. R. 403, by the turning vote of the lieutenant-governor against the opinion of a majority of the judges present; so that the question is hardly settled in New York. In England, the law is clear, that a bond is not to be discharged, except by something of as high a nature. A surety is not understood to retain such a right as the defendants contend for.”¹

And in a later Massachusetts case it was decided that when a bond is given to guarantee the fidelity of a person occupying an official, or *quasi* official position, for an indefinite period, the obligation of the guarantor cannot be terminated at his pleasure by notice, unless the right to do so was reserved in the instrument itself, or at the time the obligation was assumed. This is the rule at common law.² And the same principle prevails in courts of equity, it being held, further, that the defense of notice, if available at all, could as well be made in a court of law as in one of equity, and upon that additional ground, relief in such a case would be refused.³

§ 777. Same subject continued — Rule in New York. — And in New York the same doctrine has been held. In an action by a sheriff against the sureties of his deputy upon their official bond, they attempted to set up as a matter of defense a parol agreement by the sheriff that he would discharge them from liability upon their application to him for that purpose. The court pretermitted the question whether

¹ *Crane v. Newell*, 2 Pick. 612; 18 Am. Dec. 461. See, also, *Andrus v. Beals*, 9 Cow. 693; *Warner v. Beardsley*, 8 Wend. 199; *Manning v. Shotwell*, 5 N. J. L. 585; 8 Am. Dec. 622; *Frye v. Barker*, 4 Pick. 382; *Davis v. Huggins*, 3 N. H. 281; *Townsend v. Riddle*, 2 N. H. 451; *Crampton v. Duval*, 3 Call, 69; *Pickett v. Land*, 2 Baily, 608; *Bellows v. Lovell*, 5 Pick. 307.

² *Gass v. Stinson*, 2 Sumn. C. C. 453, 469; *s. c.*, 4 Myers' Fed. Dec., 721; *Calvert v. Gordon*, 7 Barn. & Cr. 809; *s. c.*, 3 Mann. & Ryl. 124.

³ *Gordon v. Calvert*, 2 Sim. 253; *s. c.*, 4 Russ. 581. See, also, *Shepherd v. Beecher*, 2 Peere Wms. 288.

a sealed contract could be so modified by a parol agreement upon sufficient consideration, but decided that "a parol agreement between the parties, without a good and sufficient consideration, cannot" operate the release of the surety.¹

§ 778. Same subject continued — Rule in Pennsylvania. — In Pennsylvania, the supreme court in a like case, after reviewing a number of cases, and among others that of *Pain v. Packard*, 13 Johns. 174, and *King v. Baldwin*, 17 Johns. 403, arrives at the conclusion that if a creditor, after being requested to bring suit against a principal debtor, refuse or neglect to do so, the surety is discharged, provided the request be proved clearly and beyond all doubt, and provided it be positive, and accompanied with a declaration that unless the request be complied with, the surety will be considered as discharged. The court, however, places its ruling distinctly upon the ground that in Pennsylvania, there being no court of chancery, the court holds itself bound to administer equity in all cases where the forms of law do not restrain it. "They (the courts) can not compel the specific performance of an agreement because they cannot take cognizance of a bill in equity. But they come as near it as they can. * * * So, in an action on a bond, they will permit the obligor to make any plea which would entitle him to relief in equity. On the same principle a surety ought to be relieved, who has done everything to enforce his equity which the nature of the case admitted."²

§ 779. Release of surety — What notice is necessary to effect it — Strict construction against surety. — That the

¹ *Barnard v. Darling*, 11 Wend. 28.

² *Cope v. Smith*, 8 Serg. & R. 110, 115. See, also, *Dehuff v. Turbett*, 3 Yeates, 158; *Commonwealth v. Wolbert*, 6 Binn. 292; 6 Am. Dec. 456; *Gardner v. Ferree*, 15 Serg. & R. 28; 16 Am. Dec. 513; *Erie Bank v. Gibson*, 1 Watts, 143; *Pain v. Packard*, 13 Johns. 134; 7 Am. Dec. 369; *King v. Baldwin*, 17 Johns. 403; 8 Am. Dec. 415.

construction of an official bond, and its effect and operation are controlled by its terms has been repeatedly said in this work, and in no respect is the rule more rigidly enforced than when it is sought to effect the release of a surety from his obligation. A surety is certainly entitled to stand on the very terms of his contract, but it is equally true that he is bound by those very terms. Every instrument is most strongly construed against its obligor. Thus, in a bond, it was stipulated that it "shall continue in force until terminated by the obligors by notice in writing, signed by the parties giving the same." One of several sureties gave the notice, the others did not, and it was held by the court that the notice did not release the sureties, or any of them.¹

Upon the same principle, while a surety is entitled to the most favorable construction of those terms, he is, nevertheless, bound by the plain intent and meaning of the language to which he has affixed his hand and seal. Thus, a surety on the bond of a manufacturer of tobacco is bound by the plain terms of his bond for his principal's complying with all the requirements of the law. One of those requirements is that before his license shall expire he will renew it. The undertaking of the surety is not limited to a specified time, but is bound for his principal while he shall manufacture tobacco at the place specified in the bond, and consequently the surety is not released by the failure of his principal to renew his license, but is liable for breaches of the bond occurring after the expiration of the license.²

§ 780. Limit of surety's liability—Amount of recovery.—The liability of the surety, can in no case exceed that of his principal, and where the latter has been fixed by

¹ *McFall v. Howe, etc., Co.*, 90 Ind. 148.

² *United States v. Truesdell*, 2 Bond C. C. 78, 84; 4 Myers' Fed. Dec., § 685.

a judgment, the surety's responsibility is limited to the amount of that judgment. If a judgment against the surety be rendered for that amount, it cannot be reversed because it is too small; although the judgment against the principal is afterwards reversed for that reason, and a judgment is rendered against him for a larger amount. The verdict and judgment against the principal is the highest evidence of the amount of the surety's liability; it is competent for him to avail himself of it, and it is conclusive in his favor.¹ And upon the same principle it has been decided that when the principal obligor in an official bond has been judicially declared blameless, the surety is entitled in equity to be released from any liability growing out of the same transaction, and this although a judgment had been rendered against the surety upon the same cause of action, on which the plaintiff failed to hold the principal responsible. In a case of this character, where the principal and his sureties severed in their respective defenses, judgment being rendered against them, and afterwards for their principal, it was held upon a bill filed for their relief, that the judgment against them should be set aside or perpetually enjoined, upon the very plain principle that the judgment in favor of the officer extinguished the debt; and the principal thing being thus destroyed, the incident, the obligation of the surety, perished with it.²

§ 781. **Limit of surety's liability.** — It must always be remembered that the liability of a surety on an official bond, is fixed only by a breach of the condition of the bond. The sureties are in no respect responsible for the malfeasance or misfeasance in office of their principal, unless it amounts to such a breach. Still less are they

¹ *United States v. Allsbury*, 4 Wall. (71 U. S.) 186, 187; *s. c.*, 4 Myers' Fed. Dec., § 485.

² *Ames v. Maclay*, 14 Iowa, 281; *Jackson v. Griswold*, 4 Hill (N. Y.), 529.

responsible for irregular or contingent liabilities of their principal. Thus, a defendant in an execution who had paid the money due on it to the sheriff, who died before he paid it over to the plaintiff, or paid it into court, could not recover back the money from the sureties on his bond, although after the sheriff's death the judgment had been reversed on appeal. The sheriff's estate was bound to refund the money, but the sureties were not liable for the very obvious reason, that up to his death the sheriff had been in no default.¹

§ 782. Same subject continued. — The liability of sureties is limited by the terms of the bond, as well in respect of the persons to whom they can be made responsible, as of the defaults which may be laid to their charge. Thus, the condition of the bond of a sheriff was, among other things, that he should pay all money received by him to the person to whom it may be due. Money received on an execution is due to the plaintiff in that execution, and not to the defendant from whom it was received. Therefore, it was held, in Mississippi, that where defendant paid to the sheriff in discharge of an execution, certain uncurrent money which the plaintiff refused to receive, and defendant had to pay the debt in good money, he could not recover from the sureties of the sheriff the value of his uncurrent money. The transaction, the court said, did not come within the condition of the bond. In paying uncurrent money the debtor assumed the risk of his creditor's receiving it, and could not throw that risk on the officer's sureties.²

§ 783. Same subject continued. — The sureties of an officer are not responsible for his irregular and unofficial acts, nor of course for his personal debts and defaults. Thus, a sheriff made an agreement with a claimant of goods, that he

¹ *State v. Vananda*, 7 Blkfd. (Ind.) 214.

² *Brown v. Moseley*, 11 Smed. & M. (19 Miss.) 354.

(the sheriff) would sell them and hold the money to answer the judgment, if the claimant obtained one in the replevin suit which he had instituted. Having sold the goods the sheriff paid the money into court, and it was turned over by order of the court to other parties. The court decided that the sheriff was the private agent of the claimant, and if responsible to the claimant at all, was responsible individually, and not officially, and that his sureties on his official bond were not liable.¹

§ 784. Surety — Statute of limitations in favor of. — In some of the states there are special statutes limiting actions against sureties on official bonds of certain officers. These statutes are, of course, to be construed according to their respective terms, but in all of them a vital question is: when does the statute begin to run? The answer to this question is, upon general principles, that the statute begins to run as soon as the liability of the surety is fixed. Whenever such a default has been committed by the officer as amounts to a breach of the bond, a cause of action exists, and then the statute commences running in favor of the surety against that cause of action. This was the ruling of the supreme court of Alabama on the statute of that state,² and upon general principles, the same rule will apply to any other statute unless its terms are very exceptional.

§ 785. Official bond — When a continuing security — Statute of limitations, application of to such a bond — The fact that a portion of the liability of a surety on an official bond has been barred by the statute of limitations, by reason of the negligence of the officials, whose duty it was to enforce that liability, does not operate as a discharge of the surety from responsibility for later defaults. The bond of a guardian of a lunatic is a continuing liability, and

¹ Schloss *v.* White, 16 Cal. 65, 68.

² Governor *v.* Stonum, 7 Ala. 679, 685.

each successive failure to comply with its conditions, is a new breach, and furnishes a new and independent cause of action, which may be sued upon at any time within the period of limitation. And that the principal was not removed from his office at an earlier day, is not such laches on the part of the proper official as would release his sureties.¹

§ 786. Discharge of surety on official bond by delay of government to bring suit. — Although the United States is in no degree bound by the laches of its agents, it is nevertheless barred, when the delay of the proper officers to bring suit upon an official bond, extends beyond the period within which such suits are limited by statute. Thus, where a default was made, and for three years thereafter, the principal was permitted to remain in office before suit was brought against his sureties, they were discharged under an act of congress (March 3, 1825) which declared that if default be made at any time, and suit be not brought in two years, the sureties "shall not be liable to the United States, nor shall suit be instituted against them."²

§ 787. Discharge of surety—By acceptance of part performance of contract by principal. — The strictness with which the obligation of sureties is construed, may be further illustrated by a case in which the principal undertook for a stipulated sum, to deepen a ship channel, so that it should be twenty feet deep, and three hundred feet wide, and to keep it in that condition for four years and a half. He gave a bond with sureties, conditioned that he would perform this contract. The United States, however, did not exact of the principal the full performance of his contract, and accepted his work when he had made the

¹ *McKim v. Williams*, 134 Mass. 186, 187; *Austin v. Moore*, 7 Metc. 116; *Prescott v. Read*, 8 Cush. 365; *Chapin v. Livermore*, 18 Gray, 561.

² *Roddy v. United States*, 2 Pittsburg R. 374.

channel eighteen feet deep, and paid him the stipulated price for the work. It afterwards sued the sureties, alleging as a breach of his bond, that the principal had not kept the channel open according to the contract. The court held that by accepting the work, the government had released the sureties from their obligation that their principal would deepen the channel to the depth of twenty feet, that by accepting an eighteen foot channel, the government waived all that part of the contract which required a twenty foot channel, and in doing so made a new arrangement, to which the sureties were not parties, and by which they were not bound. It was further held that by this new arrangement the performance of the contract by which the sureties became bound was rendered impossible. They were bound that their principal should maintain a twenty foot channel, the creation of which should have been accomplished by him. There was no such channel and by reason of the new arrangement there never could be. They were under no obligation to maintain an eighteen foot channel, they had not contracted to do so, and were entitled to stand upon the very terms of their contract. Even if the new arrangement was more favorable to the sureties than the old, which, however, was more than doubtful, it operated, nevertheless to relieve them from their liability.¹

§ 788. Surety not liable for losses caused by the misconduct of the obligee. — This proposition would seem to be self-evident, but the supreme court of New York found it necessary to decide it. A bond was given to a sheriff to indemnify him for seizing certain personal property, supposed to be worth about \$14,000, upon an execution for over \$16,000. The seizure was made and the sheriff so managed, or mismanaged, that the goods yielded only about \$2,000 above costs and allowances. Judgment having

¹ United States *v.* Corwine, 1 Bond C. C. §39, 345; *s. c.*, 4 Myers' Fed Dec., §§ 736, 737.

been recovered against the sheriff in a large amount for his trespass in taking the property, an action was brought on the indemnity bond; it was held that no part of the judgment against the sheriff, which was rendered because of his illegal acts or unlawful oppression, could be laid to the charge of the sureties in the indemnity bond, and there could be no recovery against them for such damages; that they were not liable for any loss occasioned by the misconduct or negligence of the sheriff's officer; that their only liability was for the consequence of a strict discharge of the sheriff's duty in the premises, in seizing the property in due course of law, and appropriating it to the payment of the debt. For nothing beyond this could they be held liable.¹

§ 789. Discharge of surety by the discharge of his co-surety — Statutory regulations — This subject has been fully considered elsewhere, but it may here be added that it sometimes happens that the discharge of sureties on official bonds is regulated by statutes which authorize the proper officer, board, or court, upon the application of a surety to discharge him from responsibility for any further acts or defaults of his principal. In such case, unless the consequence is guarded against by the terms of the bond, or by statute law, in force at the time the bond is executed, the discharge of one surety, upon his application, releases all his co-sureties from liability for the subsequent acts or defaults of the principal. And the fact that the judge in discharging the surety, omits to perform his further duty prescribed by the statute, of declaring the office vacant, in no degree abrogates the discharge of the surety who applied, or the consequent discharge of his co-sureties. Unless the discharge of the surety upon his application be made expressly dependent upon the further action of the court

¹ O'Donohue v. Simmons, 31 Hun (38 Sup. Ct. N. Y.), 267, 270. See, *ante*, § 755.

vacating the office, the omission of the latter order will not invalidate the former.¹

§ 790. **Discharge of sureties by legislative action.** — When the bond of a state officer is made to the state, and under the authority of the legislature, a committee thereof proceeds to discharge the sureties on the bond from all further liability to the state, such a discharge operates to extinguish *all* liability of the sureties on the bond. “If the release is effectual as to one surety it is so as to all. If it embraces one instance of defalcation, *prima facie* it does all. The burden was on the state to show that the claim in controversy was not included in the adjustment. This it has entirely failed to do.”²

§ 791. **Release of surety by death of principal obligor** — **In what cases it occurs.** — It is hardly necessary to say that all criminal prosecutions die with the persons charged with the crime. It is also familiar law that certain civil proceedings connected with or growing out of acts of violence or other offenses against the law are equally mortal. The death of the principal in a bastardy bond operates as a discharge of the surety from all liability upon the bond. The order to pay money for the support of a bastard child is a personal punishment, and the security required is not intended to impose upon an innocent surety after the death of his principal, the punishment prescribed by the law, and awarded by the court against the offender.³

§ 792. **When principal may be released — Surety must assent — If dead, personal representative must assent.** —

¹ *People v. Buster*, 11 Cal. 215; *Averill v. Lyman*, 18 Pick. 346; *Goodman v. Smith*, 18 Pick. 416; *Canegie v. Morrison*, 2 Metc. 881; *Wiggins v. Tudor*, 23 Pick. 434; *United States v. Thompson*, Gilpin C. C. 614.

² *State of Maine v. Dow*, 53 Me. 305.

³ *City v. Haslett*, 14 Philad. 138; *Eby v. Burkholder*, 17 Serg. & R. 9; *Philippi v. Commonwealth*, 18 Penn. St. 116.

When a debtor to the United States applies for a discharge under its insolvent laws, the assent of his sureties if living, or if any one of them is dead, of his personal representative, is essential, and the discharge can only be granted upon that condition. The consent of the surety's heir is not a sufficient compliance with the law, for, although the heir could bind the real estate that may have descended to him, yet he cannot bind the general assets of the estate. So far as they are concerned, the heir is, in the sense of law, a mere stranger, without such privity or responsibility as would enable him to bind such general assets.¹

§ 793. Surety — Indemnity of, is not a fraud upon the creditors of principal. — The surety of an officer on his official bond is his creditor to such an extent that a transfer of property by his principal to him, to indemnify him against loss, may be sustained as a lawful preference of creditors. In such a case the same questions of actual fraud may be raised, as in other cases of preference, the relation between the officer and his surety raises no presumption against the validity of the transfer.²

§ 794. Discharge of surety on official bond — Effect of second bond and of judgment. — It is well settled that taking a second bond for the same liability does not operate to extinguish the first, because the second bond is a security of no higher degree than the first.³ And if a judgment has been recovered on the second bond, upon the identical breach which is complained of in the action on the first, such judgment does not operate to extinguish the first bond,

¹ *United States v. Cushman*, 2 Sumn. C. C. 310, 315.

² *Spear v. Rood*, 16 N. W. Rep. 312 (Mich.).

³ *United States v. Hoyt*, 1 Blatchfd. C. C. 326, 330; *s. c.*, 4 Myers' Fed. Dec., § 596; *Jackson v. Schaffer*, 11 Johns. 513; *Andrews v. Smith*, 9 Wend. 58; *Phelps v. Johnson*, 8 Johns. 54; *Chipman v. Martin*, 18 Johns. 240; *Jackson v. Howe*, 14 Johns. 404; *Lovelace v. Cockett*, Cro. Car. 85; *Manhodd v. Crick*, Cro. Eliz. 716; *Norwood v. Grype*, Cro. Eliz. 727.

unless, indeed, that judgment had been satisfied. In the language of Lord Ellenborough: “a judgment recovered in any form of action is still but a security for the original cause of action, until it be made productive in satisfaction of the party; and, therefore, till then it cannot operate to change any other collateral concurrent remedy which the party may have. If, indeed, one who is indebted upon simple contract give a bond, or have judgment against him upon it, the simple contract is merged in the higher security. So one may agree to accept of a different security in satisfaction of his debt.” Unless, therefore, the second bond is accepted in satisfaction of the first, or the judgment bears the appropriate fruits in satisfaction and payment, it operates only as collateral security for the first, and in no respect or degree as an extinguishment of it.¹

§ 795. When a second bond is cumulative and does not release the sureties on the first bond. — The rule on this subject is, that if the second bond, by its terms, the official order requiring it, or the terms of the decree accepting it, purports to be taken for an antecedent default, or an existing debt or claim, it will operate as an extinguishment of the first bond by which such default or debt was secured. If, however, the bond by its terms and the authority under which it is exacted, indicate that it is given only with the view of operating prospectively, it does not relieve the sureties on the first bond from any responsibility incurred up to the time the second bond was executed. As for the defaults that occur after that time, it seems that the sureties on the first bond, and those on the second bond, are in equity jointly responsible for them.²

¹ *Drake v. Mitchell*, 3 East, 251; *Holmes v. Bell*, 3 Mann. & Gr. 213; *Bell v. Banks*, 3 Mann. & Gr. 258; *Chipman v. Martin*, 13 Johns. 240; *Davis v. Anable*, 2 Hill, (N. Y.) 339; *Day v. Leal*, 14 Johns. 404.

² *Postmaster-General v. Munger*, 2 Paine C. C. 189, 199; *s. c.*, 4 Myers' Fed. Dec., §§ 598, 599. See *ante* § 773.

§ 796. When surety is not discharged by the release of principal from imprisonment. — At common law the release of a debtor whose person has been taken in execution, operated as a release of the judgment. It is competent, however, for congress to change this rule of law as to persons imprisoned under the authority of the United States; and under an act for that purpose, the person of a debtor to the United States, may be released from confinement without discharging the judgment, provided he makes a surrender of all his property. And if the terms of this act are complied with, and a surrender of the debtor's property is made, and he is released from imprisonment the judgment remains in full force, and the liability of the debtor's sureties on his official bond is unchanged. Neither the release of the debtor from imprisonment, nor the surrender of his property to the United States, discharges the surety.¹

§ 797. Release of obligor — Condition precedent — When release of principal obligor does not discharge surety. — A conditional release of an obligor is not operative until the condition is complied with. If a public officer assumes, in excess of the power vested in him, to release a principal obligor in a bond upon a condition precedent, the whole act is void and not the condition only. And if the release be legal, but is granted only upon a condition precedent, which is impossible to be performed, the release never takes effect at all, and consequently does not operate to discharge the surety.²

§ 798. Unauthorized cancellation of official bond will not discharge surety. — It was found necessary by the supreme court of Iowa to decide that the cancellation of an

¹ *United States v. Stanberry*, 1 Pet. (26 U. S.) 573, 577; 4 Myers' Fed. Dec., §§ 679, 680, 681.

² *United States v. Cushman*, 2 Sumn. 426, 432.

official bond by a person who was not authorized by law to cancel it, did not operate to discharge its obligors. Under the laws of that state, a county judge is empowered to audit and settle accounts connected with the revenue of the county, and when such a judge assumed to settle with the treasurer and collector, for state revenue collected by him, and to discharge him and his sureties from liability on their bond, it was held that his action in the matter was utterly void, and that his cancellation of the bond was not even *prima facie* evidence of satisfaction.¹

§ 799. When a surety is not released — Surety bound to know the law. — The well known principle of law that every one shall be held to intend the natural and legal consequences of his own acts, has sometimes a material bearing upon the liability of a surety. Thus where an officer had three sureties on his bond, and procured from the county court the release of one of them without the assent of the other two, substituting, however, a new surety, who took the place of the released surety, knowing that his release was the object to be effected, it was held that the new surety could not ask to be discharged on the ground that the other two sureties, who had no notice, were discharged, and that he had expected them to be his co-securities. The legal affect of his executing the bond, and of the consequent release of one surety, was the release of the other two, and he was bound to know it.²

§ 800. Release by one of several obligees, who are naked trustees without interest, does not discharge surety. — The release of a bond by one of several official obligees operates no discharge of the obligors. Where the obligee has no personal interest in a bond, and is a mere trustee for the benefit of third persons, he can neither release

¹ *Ford v. Jefferson County*, 4 Green. (Iowa) 273.

² *State v. Van Pelt*, 1 Ind. 804.

the obligors from their liability, nor discontinue a suit upon it, without the authority and consent of the beneficiary of the trust.¹

§ 801. When an official bond ceases to operate — When surety is not released — It is sometimes a critical question in cases of defaults committed by officers, when the official bond ceases to be operative and when the liability of the surety determines. The language of the bond itself usually affords the surest solution of this question. Thus, a cashier of a branch bank having been guilty of embezzlement, was promptly *suspended* by the mother bank, and his immediate superior, the president of the branch bank was instructed to take possession of the money, books, papers, etc., in the hands of the cashier. This the president did the next day after he received his instructions. In the interval between the passage of the resolution suspending him and his displacement by the president, the cashier managed to commit further frauds, and the question was made whether his sureties were liable for these last losses. It was held that, as his bond was “for and during the term he shall hold the said office of cashier,” etc., and as a suspension is not a dismissal from office, he was cashier and held “the said office,” until his dismissal some days after his eviction by the president. Therefore, the court concluded that his sureties were liable for the last frauds that he committed as well as for the first. The ruling is supported by the argument that the authority of the cashier to act as such, terminated only when he received notice of his suspension, that during that interval his acts were binding on the bank, and being cashier as to the bank, he was also cashier as to his sureties on his official bond.²

¹ *Horn v. Whittier*, 6 N. H. 88, 94; *Mountstephen v. Brooke*, 1 Chitty, 390; *Legh v. Legh*, 1 Bos. & P. 447; *Innel v. Newman*, 4 Barn. & Ald. 419; *Payne v. Rogers*, Doug. 391 (407); *Manning v. Cox*, 7 J. B. Moore, 617.

² *Bank of the United States v. McGill*, 1 Paine C. C. 661, 668.

§ 802. Temporary variation of duty — Effect of. — In the course of banking business it is competent in case of emergency, or under circumstances when convenience requires it, for one officer to be temporarily assigned to the duties usually discharged by another. And while thus engaged in the temporary discharge of another's duties, such bank officer is acting under the obligations of his bond and his sureties are as fully liable for any default or defalcation taking place under these circumstances as if he were engaged in the discharge of his own peculiar duties. Thus, the sureties of a receiving teller of the savings department of a bank, are liable for his default committed while, under the orders of the cashier, he is acting temporarily in the capacity of general teller.¹

§ 803. Surety not discharged by mistake in principal's settlement. — The liability of a surety, although it must be strictly construed, is not abrogated by mistakes made in the settlement of his principal's accounts by the proper officers. That a mistake is in ordinary transactions between individuals a good ground for relief is of course familiar law, and there is no reason why the accounts of public officers should be exempted from the operation of the same rule. In some cases, indeed, mistakes will be corrected in the accounts of public officers which if occurring between individuals would be permitted to remain untouched.² The obligation of a surety on the bond of an officer subject to be called to account, is that his principal shall render a *just* and *true* account, and an account cannot be called just or true, in which exist mistakes either manifest or occult.³

¹ Detroit Savings Bank *v.* Zeigler, 49 Mich. 157; Miner *v.* Mechanic's Bank, 1 Pet. (26 U. S.) 46; Rochester City Bank *v.* Elwood, 21 N. Y. 88; German American Bank *v.* Auth, 87 Penn. St. 419.

² Supervisors, etc., *v.* Birdsall, 4 Wend. 453.

³ Supervisors etc., *v.* Jones, 19 Wis. 51.



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